# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]1927

No. 677. [redacted]27

JOHN M. ANDERSON, PLAINTIFF IN ERROR,

vs.

PETER W. DURR, AS FORMER AUDITOR; E. S. BEAMAN, AS AUDITOR, AND CHARLES C. COOPER, AS TREASURER, OF HAMILTON COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JANUARY 19, 1928.

(27,432)

(27,432)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1919.**

## No. 677.

JOHN M. ANDERSON, PLAINTIFF IN ERROR,

*vs.*

PETER W. DURR, AS FORMER AUDITOR; E. S. BEAMAN, AS AUDITOR, AND CHARLES C. COOPER, AS TREASURER, OF HAMILTON COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 9, 1920.

# Supreme Court of Ohio

## RECORD.

### PETITION IN ERROR CLAIMING CONSTITUTIONAL QUESTIONS.

(Filed March 6, 1919.)

JOHN M. ANDERSON,
Plaintiff in Error,

No. 16234. vs.

PETER W. DURR, as former Auditor, E. S. BEAMAN as Auditor and CHARLES C. COOPER, as Treasurer of Hamilton County, Ohio,
Defendants in Error.

Plaintiff in error, John M. Anderson, says that on or about February 20, 1919, the Court of Appeals for the First Appellate District of Ohio, sitting in Hamilton County, rendered a final judgment against this plaintiff in error and in favor of defendants in error, Peter W. Durr, as former Auditor, E. S. Beaman, as Auditor and Charles C. Cooper, as Treasurer of Hamilton County, Ohio, in an action then pending therein on appeal, wherein plaintiff in error was plaintiff and appellee and defendants in error were defendants and appellants, which action involved questions

arising under the Constitution of the United States and of this State. A transcript of the docket and journal entries, the bill of exceptions, pleadings and all original papers are filed herewith.

There is error in said record and proceedings, in each of the following particulars, to-wit:

(1) The said Court of Appeals erred in finding the equities to be with the defendants and that to assess and collect a tax upon plaintiff in error's membership in the New York Stock Exchange, does not, as claimed by him in said Court, violate any of his rights under either, (a) the Constitution of the State of Ohio, nor (b) under the Constitution of the United States.

(2) The said court erred in deciding the plaintiff in error's membership in the New York Stock Exchange, is personal property within the State of Ohio, included within its taxation laws, past and present, and in dismissing plaintiff's petition for injunction.

(3) The said court erred in overruling this plaintiff in error's motion for a new trial in said court, wherein, in addition to other errors in the decision, the attention of the court was again called to the infringement of this plaintiff in error's rights under the constitutions of the United States and of this State.

(4) The said court erred in overruling this plaintiff in error's second motion for a new trial in said court, wherein, in addition to other errors in the judgment, the attention of the court was again

called to the infringement of this plaintiff in error's rights under the constitutions of the United States and of this State.

(5) That said court erred in not deciding that this plaintiff in error's membership in the New York Stock Exchange is a mere personal privilege, not property within the tax laws of Ohio.

(6) The said court erred in adjudging that said membership is property subject to taxation in the State of Ohio.

(7) The said court erred in not enjoining the Auditor from listing or attempting to list on the tax duplicate and the Treasurer from collecting or attempting to collect taxes levied or assessed upon plaintiff in error's membership in said Exchange.

(8) The said court erred in holding and deciding that as Section 5325 of the General Code does not exclude the property in question, the same is included therein.

(9) The said court erred in deciding a seat on the New York Stock Exchange constitutes personal property in this State.

(10) The said court erred in not rendering judgment for this plaintiff in error on the pleadings and evidence.

(11) The said court erred in not considering the practical construction of the taxation statutes uniformly adopted by the taxing officials of Ohio, including the legal counsel for defendants in error in the case at bar, as shown by his letter of admission to the trial judge after submission of this case, that

plaintiff in error's membership is not within the taxation statutes of Ohio, a true copy of which letter is attached to and made part of the bill of exceptions. In said letter said legal counsel admitted the said membership is not taxable under the statutes of Ohio, as the same existed when said case was submitted.

(12) The said court erred in singling out this plaintiff in error's membership for taxation when it was made to appear that liquor licenses, memberships in local stock exchange associations, trades unions, societies, clubs, exchanges, chambers of commerce, professional associations, and other organizations located in this state, never have been and are not taxed, such singling out of such membership for taxation amounting to an unfair discrimination and denial of the equal protection of the laws and failure to tax by uniform rule.

(13) The said court erred in disregarding the fact that this plaintiff in error pays taxes under the Blue Sky Law and will be taxed as a broker under the occupational tax authorized by the Charter of the City of Cincinnati.

(14) The said court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of Ohio:

(a) Since the essence of membership in the New York Stock Exchange is a privilege of doing business on certain real estate in New York and not elsewhere and for Ohio to attempt to tax same constitutes attempted taxation of property permanently

outside the State of Ohio and a taking of this plaintiff in error's property without due process of law, in violation of Article I, Sections 1 and 19 of the Constitution of Ohio;

(b) In depriving this plaintiff in error of the equal protection of the laws, other property, admittedly in Ohio, of a somewhat analogous character, not being taxed, in violation of Article XII, Section 2 and Section 5 thereof, of the Constitution of Ohio and not being taxation by uniform rule;

(c) In other respects.

(15) The said court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States:

(a) Since the essence of membership in the New York Stock Exchange is a privilege of doing business on certain real estate in New York and not elsewhere and for Ohio to attempt to tax same constitutes attempted taxation of property permanently outside the State of Ohio and a taking of this plaintiff in error's property without due process of law, in violation of Article XIV, Section 1 thereof, in addition to and amendment of the Constitution of the United States;

(b) In depriving this plaintiff in error of the equal protection of the laws, other property, admittedly in Ohio, of a somewhat analogous character not being taxed, in violation of Article IV, Section 2 thereof;

(c) In illegally interfering, if there is anything in Ohio, which plaintiff in error denies, with

Interstate Commerce, violating Article I, Section 8 of the Constitution of the United States;

(d) In other respects.

(16) Other errors apparent in the record and proceedings.

Plaintiff in error therefore prays that said judgment may be reversed and that he be restored to all things he has lost by reason thereof.

Murray Seasongood,
Attorney for Plaintiff in Error.

The issue and service of summons in error are waived and the appearance of defendants in error, is entered in the Supreme Court this 4th day of March, 1919.

Louis H. Capelle,
Prosecuting Attorney, Hamilton County, Ohio.
S. C. Roettinger,
Assistant Prosecuting Attorney, Hamilton County, O.
Attorneys for Defendants in Error.

---

## MOTION FOR NEW TRIAL.

(Filed February 6, 1919.)

Appellee, John M. Anderson, asks the court to set aside its decision heretofore rendered and for new trial of this case on appeal for each of the following reasons:

1. The decision is against the weight of the evidence.

2. The decision is not sustained by any evidence.

3. The decision is contrary to law.

4. The court erred in holding appellee's membership in the New York Stock Exchange is property in Ohio.

5. The court erred in holding that such membership is within the taxation statutes of Ohio.

6. The court erred in not considering the practical construction of the taxation statutes uniformly adopted by the taxing officials of Ohio, including the legal counsel for appellants in the case at bar, as shown by his letter of admission to the trial judge after submission of this case that appellee's membership is not within the taxation statutes of Ohio.

7. The court erred in singling out appellee's membership for taxation when it was made to appear that memberships in local stock exchange associations, trades unions, societies, exchanges chambers of commerce and other organizations located in this state never have been and are not taxed.

8. The decision is contrary to appellee's rights under the Constitution of Ohio:

(a) In taking appellee's property without due process of law;

(b) In depriving appellee of the equal protection of the laws;

(c) In other respects.

9. The decision is contrary to appellee's rights under the Constitution of the United States:

(a) In taking appellee's property without due process of law;

(b) In depriving appellee of the equal protection of the laws;

(c) In other respects.

10. Other errors manifest from the record and decision.

Murray Seasongood,
Attorney for Appellee.

---

## SECOND MOTION FOR A NEW TRIAL.

(Filed February 20, 1919.)

Appellee, John M. Anderson, asks the court to set aside the judgment for defendants heretofore rendered and for new trial of this case on appeal for each of the following reasons:

1. The said judgment is against the weight of the evidence.

2. The said judgment is not sustained by any evidence.

3. The said judgment is contrary to law.

4. The court erred in holding appellee's membership in the New York Stock Exchange is property in Ohio.

5. The court erred in holding that such membership is within the taxation statutes of Ohio.

6. The court erred in not considering the practical construction of the taxation statutes uniformly adopted by the taxing officials of Ohio, including the legal counsel for appellants in the case at bar, as shown by his letter of admission to the trial judge after submission of this case that appellee's membership is not within the taxation statutes of Ohio, a true

copy of which letter is hereto attached a nd made part hereof and marked EXHIBIT A.

7. The court erred in singling out appellee's membership for taxation when it was made to appear that liquor licenses, memberships in local stock exchange associations, trades unions, societies, clubs, exchanges, chambers of commerce, professional associations, and other organizations located in this state never have been and are not taxed.

8. The court erred in disregarding the fact that appellee pays taxes under the Blue Sky Law and will be taxed as a broker under the occupational tax authorized by the Charter of the City of Cincinnati.

9. The judgment is contrary to appellee's rights under the Constitution of Ohio:

(a) In taking appellee's property without due process of law;

(b) In depriving appellee of the equal protection of the laws;

(c) In other respects.

10. The judgment is contrary to appellee's rights under the Constitution of the United States:

(a) In taking appellee's property without due process of law;

(b) In depriving appellee of the equal protection of the laws;

(c) In illegally interfering with interstate commerce;

(d) In other respects.

11. Other errors manifest from the record and judgment.

Murray Seasongood,
Attorney for Appellee.

**Exhibit "A."**

June 28th, 1917.

Hon. John A. Caldwell, Judge,
Court of Common Pleas,
Court House, City.

Dear Sir:

Referring to the case of John M. Anderson v. Durr, Auditor, et al, No. 161769 on the docket of the Court of Common Pleas we have, upon mature consideration, come to the conclusion that the Court should grant the relief prayed for in this cause as to the year 1916 and all years prior thereto.

This conclusion is based upon the peculiar wording of Section 5376 which specifies what the return for taxation of personal property shall contain. By this section it is provided that the seventh item of such return shall be "the total value of all *articles* of personal property, not included in the preceding or succeeding classes." This provision would seem to be insufficient to include intangible or incorporeal personal property. And the specific holding in the case of Chisholm v. Shields, that the word "otherwise" as used in our tax laws includes only such property or investments as are specifically mentioned to be taxed, and that property or investments not so mentioned can not be taxed, would seem to exclude

the taxation of stock exchange seats for the reason that no item specified in Section 5376 is broad enough to specifically include such property.

Accordingly, confirming our verbal statement to you, we should be contented with the opinion of the Court if specifically based upon the above ground. We are, however, unable to concur in the other position taken by counsel for plaintiff that such seats, if taxable, can only be taxed in New York. The decisions already cited to Your Honor would seem to be conclusive upon the question that such stock exchange seats are personal property and of an incorporeal or intangible nature and that as such they would undoubtedly follow the person of the owner and have a proper situs for taxation at the domicile of such owner. We have carefully read and considered the case of State, ex rel Goetzman, v. Lord, 161 Northwestern Minn.), 516, decided March 2, 1917, and differ very strongly with counsel for plaintiff as to the scope and effect of this decision. It is elementary that incorporeal personal property may acquire a situs for taxation other than that of the domicile of the owner. Thus in the case of taxation of National Bank stock the situs is invariably the place in which the bank is located; also in numerous cases, Notes and mortgages have been given a situs in the state in which they originated, were payable and were kept, without regard to the domicile of the owner. The Lord case (supra) goes no further than to hold that stock exchange seats may be assessed for taxation in the locality of the ex-

change. The case does not hold that if assessed at the domicile of the owner such taxation would be invalid or that such seats could not be considered as having no situs elsewhere than at the location of the exchange.

If the holding of the court were based upon this question of situs we feel that it would have such effect upon questions which might arise subsequently that the litigation could not be discontinued upon the decision of your Court.

If, however, you would see fit to decide this question of situs in favor of the defendants but hold the plaintiff entitled to relief for the reason that property in the nature of stock exchange seats was not specifically taxed in accordance with the decision in the Chisholm case, and another well reasoned decision by Judge Kunkle in the 6th Nisi Prius (n.s.), 313, affirmed in the 9 Circuit Court (n.s.), 584, we should be content to let the matter rest with your decision.

Of course, if the decision is based upon this ground the injunction of the Court would have to be limitedto the year 1916 and prior thereto since the Legislature might, subsequently, amend the tax laws as to specifically include this species of property as subject to taxation.

Very truly yours,

(Signed) Smith Hickenlooper,

SH-H Assistant Prosecuting Attorney.

## BILL OF EXCEPTIONS.

(Filed February 24, 1919.)

(Transmitted to Judges Shohl, Hamilton and Cushing, February 24, 1919. Fred E. Wesselman, Clerk, by Frank Lewis, Deputy.)

(Received from Clerk of Court of Appeals this 24th day of February, 1919. Walter M. Shohl, Presiding Judge, Francis M. Hamilton, Wade Cushing, JJ.)

(Received from Judges Shohl, Hamilton and Cushing, February 24, 1919, endorsed "Allowed." Fred E. Wesselmann, Clerk, by Frank Lewis, Deputy.)

We consent that within Bill of Exceptions may be transmitted immediately, and that only marked portions of "Exhibit 2" need be printed.

Louis H. Capelle,
Prosecuting Atty.
S. C. Roettinger,
Asst. Prosecuting Atty.

At the trial of this cause on appeal, there was offered in evidence stipulation as to facts, agreed to in open court by the counsel for the plaintiff appellee and for the defendant appellants and filed, with the approval of the court, on the 19th day of December, 1918, hereto attached, made part hereof, and marked EXHIBIT 1; also, by the plaintiff appellee, a copy of the constitution of the New York Stock Exchange and resolutions adopted by the governing committee with amendments as contained in

the booklet hereto attached, made part hereof and marked EXHIBIT II; also, by the plaintiff appelee, letter of June 28, 1918, from the then assistant prosecuting attorney, civil department, to the trial judge in the Common Pleas Court, a true copy of which is hereto attached, made part hereof and marked EXHIBIT III. No other evidence was offered by either party and the foregoing is all of the evidence given or offered at said trial.

Whereupon the court rendered a decision in favor of the defendant appellants. The plaintiff thereafter filed a motion to set aside said decision and for a new trial, which was overruled, as appears of record, to which plaintiff appellee excepted.

Whereupon the court gave judgment for the defendants, as appears of record in the cause; and the plaintiff thereafter filed a second motion to set aside said judgment and for a new trial, which was overruled by the court.

And the plaintiff appellee thereupon excepted to the overruling of said motion, and now comes and presents to the court his true bill of exceptions, of the filing of which opposite counsel were duly notified, and prays that the same may be allowed by this court, signed, and made part of the record; and this court, on consideration thereof, finds the bill (with the exhibits, thereto attached) to be a true bill of exceptions, and grants said prayer, and now allows and signs said bill of exceptions, and orders that the same be filed and made a part of the record

in this cause, all of which is accordingly done, this 24th day of February, A. D. 1919.

Walter M. Shohl,
Presiding Judge of the Court of Appeals for the First Circuit, Hamilton County, Ohio.
Francis M. Hamilton, Judge.
Wade Cushing, Judge.

## CONSTITUTION.

### Rules for the Government of the Exchange.

As Amended to February, 1914.

### ARTICLE I.

Title—Objects.

The title of this Association shall be the "New York Stock Exchange."

Its object shall be to furnish exchange rooms and other facilities for the convenient transaction of their business by its members, as brokers; to maintain high standards of commercial honor and integrity among its members; and to promote and inculcate just and equitable principles of trade and business.

### ARTICLE II.

Government.

The government of the Exchange shall be vested in a Governing Committee, composed of the President and Treasurer of the Exchange, and of forty Members, elected in the manner hereinafter provided. The members of the Governing Committee, and the Secretary, shall be the officers of the Exchange.

## ARTICLE III.

### Governing Committee.

Sec. 2. The Governing Committee shall determine the manner and form by which its proceedings shall be conducted; appoint and dissolve all Standing or other Committees; define, alter and regulate their jurisdiction as stated in this instrument; have original and supervisory jurisdiction over any and all subjects and matters referred to said Committees; it may direct and control their actions or proceedings at any stage thereof, and shall try all charges against members of the Exchange and punish such as may be found guilty. It shall have entire control of the finances of the Exchange and fix the amount of fees and compensation to be paid to members of Committees, to Officers of the Exchange and to appointees of the Governing Committee. It may require of all officers or appointees of the Exchange a good and sufficient bond to secure the faithful performance of their duties. The Governing Committee shall be vested with all other powers necessary for the government of the Exchange, the regulation of the business conduct of its members, and the promotion of its welfare, objects and purposes.

## ARTICLE IV.

### President.

Sec. 1. The executive power of the Exchange shall be vested in the President, who shall direct the enforcement of the rules and regulations and have the care of all its interests. He may preside over

the Exchange whenever he shall so elect, and shall be the presiding officer of the Governing Committee.

## ARTICLE VI.

### Treasurer.

Sec. 1. It shall be the duty of the Treasurer to receive, and acting under instructions from the Finance Committee, to take charge of and disburse moneys of the Exchange. He shall present to the Governing Committee at its first regular meeting in May of each year a report of the finances of the Exchange for the twelve months ending April 30 preceding. He shall be a member of the Finance Committee, and a Trustee of the Guaranty Fund.

## ARTICLE VII.

### Secretary.

Sec. 1. The Secretary shall be appointed by a majority vote of the Governing Committee and shall hold his position subject to the pleasure of the Governing Committee. It shall be the duty of the Secretary to record in a book of minutes the proceedings of the Exchange and take charge of the books and papers of the association. He shall be the Secretary of the Governing Committee and of the Standing Committees. He shall conduct the correspondence of the Exchange and shall keep a ledger containing the names of all the members, with dates of their admission and transfer of membership. He shall be the accountant of the Exchange, and shall perform such other duties as the Governing Committee may direct.

## ARTICLE XI.

### Standing Committees.

Sec. 1. Promptly after each annual election, the Governing Committee shall appoint from its Members the following Standing Committees:

First.—A Committee of Arrangements, to consist of seven members. It shall have the general care and supervision of the Exchange, enforce all rules and regulations necessary to the conduct of business, to good order and the comfort of the members, and consider all complaints of violation of said rules. It shall control and regulate the quotation service and all telegraph or telephone connection with the Exchange. It shall, except as herein otherwise expressly provided, appoint, dismiss and determine the number, duty and pay of, all employes, and provide all supplies for the Exchange and make all necessary repairs to its building.

Second.—A Committee on Admissions, to consist of fifteen members. All applications for membership, and all applications of suspended members for reinstatement to their privileges, shall be referred to this Committee.

The affirmative vote of two-thirds, of the entire Committee shall be necessary to elect to membership, or to reinstate a suspended member.

No application for readmission of a person who has ceased to be a member of the Exchange through violation of its Constitution, or for the reinstatement of a member who has been suspended under Sec. 2, Article XVI shall be considered by this Committee,

unless said person has obtained the consent of two-thirds of the members of the Governing Committee present, when such application is considered.

Third.—An Arbitration Committee to consist of nine members. It shall investigate and decide, when properly brought before it, all claims and matters of difference, arising from contracts subject to the rules of the Exchange, between members of the Exchange, or at the instance of a non-member between members and non-members. The Committee may dismiss any case and refer the parties to their remedies at law, and it shall so refer them upon the joint request of the contestants. The decision of this Committee shall be final in all cases, unless an appeal be taken by a member of the Committee as in these rules provided, or in cases involving a sum of $2,500 or over, when either party may appeal within ten days to the Governing Committee; said appeal shall be submitted to the Governing Committee by the Secretary of the Exchange, upon a printed transcript of the records of the case, together with such printed arguments as the parties to the appeal may desire to make; upon such appeal, the Governing Committee may finally adjudicate the case, relegate the parties to their remedies at law, or direct a rehearing by the Arbitration Committee.

Eleventh.—A Committee on Securities to consist of five members. It shall make rules defining the requirements for regularity in delivery of securities dealt in at the Exchange; and decide all questions relating to the settlement of contracts subject

to the rules of the Exchange, of due bills, of irregularities in securities, or in deliveries thereof, and all questions relating to reclamations therefor.

* * * * * *

Sec. 2. The Standing Committees of the Exchange, and all Special Committees, shall determine the manner and form by which their proceedings shall be conducted; shall make such regulations for their government as they shall deem proper, and may fill any vacancies occurring in their membership, subject always to the control and supervision of the Governing Committee.

* * * * * *

## ARTICLE XIII.

### Application for Membership—Eligibility—Initiation Fee.

Sec. 1. Every applicant for membership must be at least twenty-one years of age, and a citizen of the United States.

Sec. 2. The membership of the Exchange shall not be increased except by action of the Governing Committee, which shall prescribe the number of increase and the terms of admission. Such action shall be submitted to the Exchange on the same conditions as those prescribed for amendments to the Constitution.

Sec. 3. Members admitted by transfer shall pay to the Exchange an initiation fee of Two Thousand Dollars.

Sec. 4. If the initiation fee of an applicant for admission to membership is not paid on the day of

his election and notification by the Secretary, such election shall be void.

Sec. 5. No person, elected to membership, shall be admitted to the privileges thereof until he shall have signed the Constitution of the Exchange. By such signature he pledges himself to abide by the same and by all subsequent amendments thereto.

## ARTICLE XIV.

### Dues and Fines—Penalty for Non-Payment.

Sec. 1. The dues of all members of the Exchange shall be payable on May 1st and November 1st of each year, and shall be fifty dollars semi-annually, exclusive of fines, and of assessments under Article XVIII of the Constitution.

Sec. 2. Any member who shall neglect to pay his fines, dues or any assessment for the Gratuity Fund for three months after they become payable, shall be reported by the Treasurer to the President, who shall, after due notice to the delinquent, suspend said delinquent until said dues are paid.

If the fines, dues or assessments of any suspended member, are not paid at the end of one year after they become payable, the membership of said suspended member may be disposed of by the Committee on Admissions.

## ARTICLE XV.

### Transfer of Membership.

Sec. 1. A transfer of membership may be made upon submission of the name of the candidate to the Committee on Admissions, and the approval of the transfer by two-thirds of the entire Committee. No-

tice of the proposed transfer shall be posted on the bulletin in the Exchange for at least ten days prior to transfer.

Sec. 2. All contracts subject to the rules of the Exchange, made by a member proposing to transfer his membership, shall mature on the tenth day of the posting of notice of the proposed transfer; and said member shall not be permitted, thereafter, to make any contracts subject to the rules of the Exchange, pending the approval of the proposed transfer by the Committee on Admissions.

This rule shall also apply in cases where a membership is disposed of by the Committee on Admissions.

Sec. 3. Upon any transfer of membership, whether made by a member voluntarily, or by the Governing Committee or the Committee on Admissions in pursuance of the provisions of the Constitution, the proceeds thereof shall be applied to the following purposes and in the following order of priority, viz.:

First.—The payment of all fines, dues, assessments and charges of the Exchange, or any department thereof, against a member whose membership is transferred.

Second.—The payment of creditors, members of the Exchange, or firms registered thereon, of all filed claims arising from contracts subject to the rules of the Exchange, if, and to the extent that, the same shall be allowed by the Committee on Admissions. If said proceeds shall be insufficient to pay

said claims, as so allowed, in full, the same shall be applied to the payment thereof *pro rata*.

Third.—The surplus, if any, of said proceeds shall be paid to the person whose membership is transferred, or to his legal representatives, upon the execution by him or them of a release or releases satisfactory to the Committee on Admissions.

The Committee on Admissions shall have power, by rule or otherwise, to secure the observance of the provisions of this Article.

Sec. 4. All unmatured debts or other obligations of a member, arising out of contracts subject to the rules of the Exchange, shall become due and payable immediately prior to the transfer of his membership; and all claims filed with the Committee on Admissions, founded upon contracts subject to the rules of the Exchange, shall, if, and to the extent that the same are allowed by said Committee, be liquidated, and paid, *pro rata*, out of the proceeds of said membership upon consummation of the transfer.

Sec. 5. A member shall forfeit all right to share in the proceeds of a membership, unless he file a statement of his claim with the Committee on Admissions prior to the transfer of such membership; but such claim, as allowed by the Committee on Admissions, may be paid out of any surplus remaining after all other claims, allowed by said Committee, have been paid in full.

Sec. 6. Claims growing out of transactions between partners, who are members of the Exchange, shall not share in the proceeds of the membership

of one of such partners, until after all other claims, as allowed by the Committee on Admissions, have been paid in full.

Sec. 7. When a member dies, his membership may be disposed of by the Committee on Admissions.

Sec. 8. When a member is expelled, or becomes ineligible for reinstatement, his membership may be disposed of forthwith by the Committee on Admissions.

Sec. 9. The expulsion or suspension of a member shall not affect the rights of creditors, members of the Exchange or of firms registered thereon.

Sec. 10. When a member is in debt to another member, the death of the creditor member or the transfer of his membership, either by himself voluntarily, or by the Governing Committee, or the Committee on Admissions, shall not affect the rights of said creditor member, his firm, or estate, to share in the proceeds of the membership of the debtor member under this Article, in the same manner and to the same extent as if such creditor member had not died or his membership had not been transferred.

## ARTICLE XVI.

Insolvent Members—Suspension—Reinstatement.

Sec. 1. A member who fails to comply with his contracts, or is insolvent, or who is a partner in a firm, registered upon the Exchange, which fails to comply with its contracts, or is insolvent, shall immediately inform the President, in writing, that he or his firm, is unable to meet their engagements,

and prompt notice thereof shall be given to the Exchange. He shall thereby become suspended from membership until, after having settled with his creditors, or the creditors of his firm, he has been reinstated by the Committee on Admissions.

Sec. 2. Whenever the President shall ascertain that a member has failed to meet his engagements, or is insolvent, or that a firm registered upon the Exchange has failed to meet its engagements, or is insolvent, and that such member, or such firm, has neglected to comply with the requirements of the preceding section, he shall announce to the Exchange the insolvency and supsension of such member or such firm.

Sec. 3. If a member, suspended under this Article, fails to settle with his creditors and apply for reinstatement, within one year from the time of his suspension, his membership shall be disposed of by the Committee on Admissions.

The Governing Committee may, by a two-thirds vote of the members present, extend the time of settlement for periods not exceeding one year each. At the expiration of the time granted, the membership of said suspended member shall be disposed of as above provided.

Sec. 4. When a suspended member applies for reinstatement he shall furnish to the Chairman of the Committee on Admissions a list of his creditors, a statement of the amounts originally owing, and the nature of the settlement in each case. Notice of the proposed consideration of the application shall be

given through the Secretary of the Exchange on three consecutive days, and said notice shall also be posted upon the bulletin. Upon the applicant presenting satisfactory proof of settlement with all his creditors, the Committee shall proceed to ballot for him in accordance with its rules and regulations. Failing to receive the approving vote of two-thirds of the entire Committee, the applicant shall be entitled to be balloted for at any five subsequent regular meetings of the Committee, to be designated by himself: provided however, that the six ballotings to which the applicant shall be entitled shall be within one year from the date of his suspension, or within such further extended time for settlement as may have been granted by the Governing Committee.

If on the sixth ballot the applicant be rejected, he may appeal within ten days thereafter to the Governing Committee, who may by an affirmative vote of not less than twenty-five of its members reinstate the applicant.

If he fails to make applications to the Committee on Admissions, to be balloted for as above provided, or if rejected by the Governing Committee, his membership shall be disposed of by the Committee on Admissions.

Sec. 5. Whenever the Governing Committee shall determine, upon the report of the Committee on Admissions, that the failure of a member or of a firm registered upon the Exchange, has been caused by reckless or unbusinesslike dealing, said member, or the partner or partners in such firm who are members of the Exchange may, by a two-thirds vote of

the existing members if the Governing Committee, be declared ineligible for reinstatement.

Sec. 6. Every suspended member shall file with the Secretary of the Exchange within thirty days after his suspension, a written statement containing a complete list of his creditors and of the amount owing to each.

## ARTICLE XVII.

### Expulsion and Suspension from Membership.

Sec. 1. Unless otherwise specially provided, the penalty of suspension from membership may be inflicted, and the period of suspenison determined, by the vote of a majority of the existing members of the Governing Committee; and the penalty of expulsion from membership or of ineligibility of a suspended member for readmission may be inflicted by the vote of two-thirds of the existing members of said Committee.

Sec. 2. A member who shall be adjudged, by a two-thirds vote of all the existing members of the Governing Committee, to be guilty of fraud or of fraudulent acts, shall be expelled and the President shall so declare; public announcement of the expulsion shall be made to the Exchange and the membership shall be forthwith disposed of by the Committee on Admissions.

Sec. 3. Whenever it shall appear to a majority of the Committee on Admissions that a misstatement upon a material point has been made to it by a member, upon his application either for membership or reinstatement or extension of time, it shall report the case to the Governing Committee, who

by a two-thirds vote of all the existing members of the Committee, may expel the member.

Sec. 4. Any member, who shall be connected directly, or by a partner, or otherwise, with any organization in the City of New York which permits dealings in any securities or other property, admitted to dealing in any department of this Exchange, shall be liable to suspension for a period not exceeding one year, or to expulsion, as the Governing Committee may determine.

Sec. 5. A member making a transaction with a non-member in the rooms of the Exchange, either purchase, sale or loan, in any security or property admitted to dealings in any department of the Exchange, or in money, shall be subject to suspension for such period not exceeding not year as the Governing Committee may deem proper.

Sec. 6. A member who shall have been adjudged, by a majority vote of all the existing members of the Governing Committee, guilty of wilful violation of the Constitution of the Exchange, or of any resolution of the Governing Committee regulating the conduct or business of members, or of any conduct or proceeding inconsistent with just and equitable principles of trade, may be suspended or expelled as the said Committee may determine, unless some other penalty is expressly provided for such offense.

Sec. 7. The Governing Committee may, by a two-thirds vote of its members present, require that a member of the Exchange shall submit to the Governing Committee or any Standing or Special Committee, for examination, such portion of his books or

papers as are material and relevant to any matter under investigation by said Committee or by any Standing or Special Committee. Any member who shall refuse or neglect to comply with such requirement, or shall wilfully destroy any such required evidence, or who, being duly summoned, shall refuse or neglect to appear before the Governing Committee or any Standing or Special Committee, as a witness, or refuse to testify before any such Committee, may be adjudged guilty of an act detrimental to the interest or welfare of the Exchange.

Sec. 8. The Governing Committee may, by a vote of a majority of all its existing members, suspend from the Exchange for a period not exceeding one year, any member who may be adjudged guilty of any act which may be determined by said Committee to be detrimental to the interest or welfare of the Exchange.

Sec. 11. Whenever a member is suspended by the Governing Committee, announcement thereof shall be made to the Exchange, and such member shall be deprived during the term of his suspension of all rights and privileges of membership, except those pertaining to the Gratuity Fund.

Sec. 12. No member of the Exchange shall be allowed to be represented by professional counsel in any investigation or hearing before the Governing Committee or any Standing or Special Committee.

## The Gratuity Fund and its Trustees.

### ARTICLE XVIII.

### The Gratuity Fund.

Every member of the Exchange shall be subject to the conditions and entitled to partake of the benefits of the plan providing for the families of deceased members as hereinafter set forth.

Sec. 1. Every person who shall become a member of the Exchange shall pay to the Trustees of the Gratuity Fund the sum of Ten dollars before he shall be admitted to the privilege of membership.

Sec. 2. Upon the death of a member of the Exchange there shall be levied and assessed against every other member the sum of Ten dollars, which shall thereupon become due from him to the Exchange, and which shall be charged and collected as other dues and fines are or may be then charged and collected.

Sec. 3. Assessments under the provisions of this Article shall be made equally against all members, either living or deceased, until the date of the transfer of their memberships.

Sec. 4. The faith of the Exchange is hereby pledged to pay, within one year after proof of death of any member, out of the money collected under the provisions of this Article, the sum of Ten thousand dollars, or so much thereof as may have been collected, to the persons named in the next Section, as therein provided, which money shall be paid as a *gratuity* from the other members of the Exchange, free from all debts, charges or demands whatever.

Sec. 5. Should the member die leaving a widow and no descendant, then the whole sum shall be paid to such widow for her own use.

Should the member die leaving a widow and descendants, then one-half shall be paid to the widow for her separate use and one-half to the children for their use, share and share alike, provided that the share of the minor children shall be paid to their guardian, and that the issue of any deceased child shall be entitled to receive the share which said child would have received if living, if of age directly, or if minors, through his, her or their guardian or guardians.

Should the member die leaving descendants and no widow, then the whole sum shall be paid to the children as directed in the preceding paragraph to be done with the moiety; but no adopted child shall share in the gratuity if the member leaves a widow or descendants.

Should the member die leaving neither widow, descendant, adopted child nor issue of a deceased adopted child, then the whole sum shall be paid to the same persons who would, under the laws of the State of New York, take the same by reason of relationship to the deceased member had he owned the same at the time of his death; and if there be no such person, then the assessment levied in such case shall be credited to those members of the Exchange against whom it shall have been charged, in reduction of their payments under this Article.

Sec. 6. Nothing herein contained shall ever be taken or construed as a joint liability of the Ex-

change or its members for the payment of any sum whatever; the liability of each member, at law or in equity, being limited to the payment of Ten dollars only on the death of any other member, and the liability of the Exchange being limited to the payment of the sum of ten thousand dollars, or such part thereof as may be collected, after it shall have been collected from the members, and not otherwise.

Sec. 7. Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts; but it shall be construed as the solemn agreement of every member of the Exchange to make a voluntary gift to the family of each deceased member, and of the Exchange, to the best of its ability, to collect and pay over to such family the said voluntary gift.

Sec. 8. There shall be credited annually to each member of the Exchange, in reduction of his payments under this Article, his proportion of the surplus income of the Exchange, after setting apart such sum as the Governing Committee shall determine to be necessary for conducting the business of the Exchange.

Whenever the number of deaths of members of the Exchange shall exceed fifteen in any one year, the Trustees of the Gratuity Fund shall pay over to the Treasurer of the Exchange the net income which has been received as interest on the Fund during said year, less the necessary expenses of management and distribution, and each member of the Exchange shall be credited with his proportion of the

amount, in reduction of his payments under this Article.

Sec. 9. The provisions of this Article shall not extend to any member whose connection with the Exchange shall have been severed by the transfer of his membership, whether the same is made voluntarily or involuntarily, nor to any member who now is or hereafter may be expelled by the Governing Committee, but shall extend to suspended members.

## ARTICLE XIX.

### The Trustees of the Gratuity Fund.

Sec. 1. The execution of the provisions of the preceding Article, and the management and distribution of the Fund created thereunder shall be under the charge of a Board of Trustees, to be known as "The Trustees of the Gratuity Fund," and to consist of the President and the Treasurer of the Exchange, and five other Trustees chosen for the term of five years.

In case of a vacancy occurring among the five chosen Trustees, the Governing Committee, at its next regular meeting thereafter, shall proceed to fill the same until the next annual election of the Exchange.

Sec. 2. It shall be the duty of the Trustees to invest and keep securely invested, in accordance with the laws of the State of New York regulating Trust Funds, all moneys paid to them for the Fund, together with the interest and accretions arising therefrom.

All stock shall be registered in the name of "The Trustees of the Gratuity Fund of the New York Stock Exchange," but without specifying the individual names of such Trustees, and may be disposed of and assigned by any four of said Trustees.

Sec. 13. It shall be the duty of the Treasurer of the Exchange to pay over, semi-monthly, all assessments collected under Article XVIII of the Constitution, to the Treasurer of the Gratuity Fund.

Sec. 4. Dealing upon any other Exchange in the City of New York or publicly outside of the Exchange, either directly or indirectly, in securities listed or quoted on the Exchange, is forbidden; any violation of this rule shall be deemed to be an act detrimental to the interest or welfare of the Exchange.

Sec. 5. After the admission of a security to dealings upon the Exchange no change in the form of certificate, or of the Transfer Agency or the Registrar of Shares, or of the Trustee of Bonds shall be made without the approval of the Committee on Stock List.

## ARTICLE XXXIV.

### Commissions.

Sec. 1. Commissions shall be charged and paid, under all circumstances, upon all purchases or sales of securities dealt in upon the Exchange; and shall be absolutely net, and free from all or any rebatement, return, discount or allowance in any shape or manner whatsoever, or by any method or arrangement, direct or indirect; and no bonus, nor any percentage or portion of the commission, shall be given,

paid or allowed, directly or indirectly, or as a salary, or portion of a salary, to any clerk or person, for business sought or procured for any member of the Exchange.

Sec. 2. All commissions shall be calculated upon the par value of securities and the rates shall be as follows:

## ARTICLE XXXV.

Office Address—Partnerships—Branch Offices.

Sec. 1. Every member shall register with the Secretary an address, and subsequent changes thereof, where notices may be served. The registered address of every member, transacting business upon the Exchange, must be in its vicinity.

Sec. 4. A member shall not form a partnership with a suspended member of the Exchange, nor with any person who has been expelled therefrom; nor with any insolvent person or with any person who may have previously been a member of the Exchange, and against whom any member holds a claim, arising out of transactions made during the time of such membership, and which has not been released, or settled in accordance with the laws of the Exchange.

A member, who is a special partner in a firm, does not thereby confer any of the privileges of the Exchange on such firm.

Sec. 5. A member of the Exchange who is a general partner in a firm represented thereon is liable to the same discipline and penalties for any act or omission of said firm, as if the same were committed

by him personally; but the Governing Committee may in its discretion by a vote of not less than thirty members relieve him from the penalty therefor.

## ARTICLE XXXVI.

### Disorderly Conduct.

Sec. 1. Indecorous language, or an act subversive of good order and decorum, or serious interference with the personal comfort or safety of another person is forbidden. Any member who shall violate this rule, within the limits of any department of the Exchange, may be fined by the Committee of Arrangements, in a sum not exceeding fifty dollars; or upon complaint made may be summoned before the Governing Committee and suspended for a period not exceeding sixty days.

Sec. 2. The Committee of Arrangements may make rules to govern the conduct of members upon the Exchange; it may impose a fine, not exceeding fifty dollars, for each violation thereof, or may report the delinquent to the Governing Committee, who may suspend him for a period not exceeding sixty days.

Sec. 3. Betting or offering to bet, upon the floor of the Exchange, is forbidden. A member violating this rule shall be subject to the penalties prescribed in the preceding Section of this Article.

### Margins—Improper Use of Securities of Customer—Reckless and Unbusinesslike Dealing.

February 13, 1913.

"That the acceptance and carrying of an account for a customer, either a member or a non-member,

without proper and adequate margin may constitute an act detrimental to the interest and welfare of the Exchange, and the offending member may be proceeded against under Section 8 of Article XVII of the Constitution.

"That the improper use of a customer's securities by a member or his firm, is an act not in accordance with just and equitable principles of trade, and the offending member shall be subject to the penalties provided in Section 6 of Article XVII of the Constitution.

"That reckless or unbusinesslike dealing is contrary to just and equitable principles of trade, and the offending member shall be subject to the penalties provided in Section 6 of Article XVII of the Constitution, in every case in which the offense does not come within the provisions of Section 5 of Article XVI thereof."

---

## EXHIBIT I.

## STIPULATION AS TO FACTS.

In addition to the facts admitted by both parties in the pleadings in this case, it is further stipulated by and between the parties hereto, for the purposes of this action, that the facts in the case are as follows: The Constitution, By-Laws and Rules governing the New York Stock Exchange at the time this action was instituted, are as set out in full in part 4, of the Hand Book of Stock Exchange Laws, by Samuel F. Goldman, Edition of 1914, being pages 117 to 191, thereof, inclusive, and the same are incor-

porated herein by reference and made a part of this stipulation, the same as if expressly set out herein in detail. The New York Stock Exchange is a voluntary association consisting of 1100 members. It is not a corporation or stock company. The member receives no certificate of stock or other evidence of membership, except a letter from the Secretary of the Exchange, notifying him that he had been elected to membership. A copy of the plaintiff's notification is as follows:

"New York Stock Exchange.

Secretary's Office. New York, January 26, 1911.

Mr. John M. Anderson,

Dear Sir:

I take pleasure in informing you that you were this day elected a member of the New York Stock Exchange.

Respectfully,

(Signed) H. L. Martin,

Ass't Secretary."

The property belonging to this voluntary association is as follows:

1. The building in which the business of the New York Stock Exchange is transacted, and the land on which it is built, located in the City of New York, State of New York, are of the approximate value of $5,200,000. The title to this land and building is in a corporation duly incorporated under the laws of the State of New York, of which the entire capital stock is beneficially owned by the New York Stock Exchange, which stock is kept for it in the

City of New York, State of New York. This company is known as the New York Stock Exchange Building Company.

2. The furnishings and fixtures in and used in connection with said building, are of the approximate value of $ , all located in the City of New York, State of New York.
3. Cash in bank deposited with a New York bank or banks, used for the current expenses of the Exchange.
4. Securities, consisting of stocks, bonds, and the like, in which the surplus funds of the Exchange are invested, which are kept permanently in the City of New York, State of New York, so long as they are owned by the said Exchange; $99,500 of the stock of the New York Exchange Safe Deposit Company, the capital of which is $100,000, which is what that property is worth; also, the capital stock, $500,000 of the New York Quotation Company, the property of which is worth something under $100,000.
5. The personalty of the Exchange is taxed at $10,000.

A membership in the New York Stock Exchange gives a member the privilege of transacting a brokerage business in stocks listed on the New York Stock Exchange, only in the building where said Exchange is located, and during the hours fixed for the operation of said Exchange.

A membership in the New York Exchange is considered by the Courts of New York State, as capital of the member located entirely in the State of New York, and as such as subject to an inheritance tax under the laws of the State of New York, even when such membership inhered in a deceased non-resident. The principle of this construction has been upheld by the Supreme Court of the United States in a case of membership in a similar body, namely, the Minneapolis Board of Trade.

Residents of Ohio have been members of the New York Stock Exchange since before the year 1882, and no tax has been collected on such a membership by the State of Ohio or any political subdivision thereof.

A membership in the New York Stock Exchange has never been subjected to a tax of any kind, outside of the State of New York.

The opinion under which the tax in the instant case was attempted to be assessed and levied was rendered by the prosecuting attorney of Hamilton County, Ohio, and not by the attorney general of Ohio, the Tax Commission of Ohio or its counsel. So far as the parties are aware, there has been no attempt to impose a tax on the value of a membership in the New York Stock Exchange, in the State of Ohio, outside of Hamilton County, though members of said Exchange reside in the State of Ohio outside of said county.

The firm of Anderson & Powell, of which the plaintiff is a member, and for whose benefit he holds his membership in the New York Stock Exchange, has

complied with the laws of Ohio, known as "The Blue Sky Law," being sections 6373-1 to 6373-24, inclusive, of the General Code of Ohio, regulating the business of brokers and the dealing in securities, and has paid the license fee or tax required to be paid under said laws.

Memberships in labor unions, social clubs, the Associated Press, masonic and fraternal orders, commercial clubs, lodges, Chambers of Commerce, local stock exchanges, and other similar voluntary business and social associations and organizations are not subjected to a tax in Ohio. Ohio Liquor Licenses, though having a market value, are not subject to a personal property tax. The privileges of practicing law, medicine or other similar professions, or callings, and membership in legal, medical and kindred associations, are not subject to taxation in Ohio.

The New York Stock Exchange pays no dividends to members, and is not accustomed to make or does not intend to make, any distribution of assets to members, except as provided by its Gratuity Fund as set forth in the Constitution of said Exchange.

---

## EXHIBIT III.

Exhibit III is the same as Exhibit A to second motion for a new trial printed *supra*, p. 10.

## TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES IN COURT OF APPEALS.

(Filed in Supreme Court March 6, 1919.)

Appeal Transcript and Original Papers filed May 15th, 1918. Common Pleas No. 161769.

1918, Dec. 19. Three copies of brief on behalf of plaintiff, appellee, filed.

1918, Dec. 19. Three stipulations as to facts filed.

1919, Feb. 6. Motion for new trial filed.

1919, Feb. 20. Second motion for new trial filed.

1919, Feb. 20. Min. 35: Judgment entry dissolving injunction, dismissing petition, overruling motions for new trial at costs of plaintiff in error and staying execution of judgment until final disposition of this cause.

This cause came on for hearing on appeal from the Court of Common Pleas, on the transcript of docket and journal entries, the original papers, the pleadings, stipulation as to facts, agreed to in open court by the counsel for the plaintiff appellee and defendant appellants and filed, with the approval of the court, on the 19th day of December, 1918; also, upon a copy of the constitution of the New York Stock Exchange and resolutions adopted by the governing committee with amendments as contained in booklet marked Exhibit 2 and on the letter of June 28, 1917, from the then assistant prosecuting attorney, civil department, to the trial judge in the Common Pleas Court, no other evidence being offered by either party.

The court having rendered a decision that the petition should be dismissed, plaintiff appellee, filed his motion for a new trial, which the court overruled. to which plaintiff appellee excepted.

The court finds the equities are with the defendants and that to assess and collect a tax upon plaintiff appellee's membership in the New York Stock Exchange, does not, as claimed by him in this court, violate any of his rights under the constitution of the state of Ohio, nor under the constitution of the United States. To each and all of the foregoing findings plaintiff appellee excepts.

It is therefore ordered that the injunction herein be dissolved and the petition be dismissed and the defendants go hence without day and recover their costs of the plaintiff, to each and all of the foregoing, plaintiff appellee excepts, but the plaintiff appellee having signified his intention to take appellate proceedings, the dissolution of the injunction and dismissal of the petition are stayed pending such proceedings and until the final determination of this cause.

Thereafter came the plaintiff appellee and filed his second motion for new trial, which the court likewise overrules, to which plaintiff appellee excepts.

1919, Feb. 24. Bill of exceptions filed.

1919, Feb. 24. Waiver of notice and consent to immediate transmission of bill of exceptions to Judges Shohl, Hamilton and Cushing.

1919, Feb. 24. Bill of exceptions transmitted to Judges Shohl, Hamilton and Cushing.

1919, Feb. 24. Bill of exceptions received from Judges Shohl, Hamilton and Cushing signed and allowed.

(Duly certified.)

---

## PETITION.

(Filed March 30, 1916.)

Court of Common Pleas, Hamilton County, Ohio.

JOHN M. ANDERSON,
Plaintiff,

No. 161769. versus

PETER W. DURR, as Auditor, and CHARLES C. COOPER, as Treasurer, of Hamilton County, Ohio,
Defendants.

The plaintiff, John M. Anderson, is a resident of Hamilton County, Ohio, and is and has been for five years last past a member of the New York Stock Exchange. This Exchange is an unincorporated association of persons, the object of which is to furnish and it does furnish exchange rooms and other facilities in New York City for the convenient transaction of their business by its members, as brokers; to maintain high standards of commercial honor and integrity among its members; and to promote and inculcate just and equitable principles of trade and business. In substance, the privilege conferred by membership in the Exchange is to trade at the Exchange in New York City, and not elsewhere, in cer-

tain securities listed on said Exchange, according to certain conditions and at certain hours during the day.

The government of the Exchange is vested in a Governing Committee, composed of the President and the Treasurer of the Exchange and of forty (40) Members, elected as provided by the constitution and rules for the government of the Exchange. No person can be admitted to membership in the Exchange unless elected by the entire vote of two-thirds of the fifteen (15) Members comprising the Committee on Admissions.

A person elected to membership must pay an initiation fee and before being admitted to the privileges of the Exchange must sign the Constitution, whereby he pledges himself to abide by the same and by all subsequent amendments thereto.

The dues of Members are $50.00 semi-annually, exclusive of fines and of assessments for the Gratuity Fund, which is a plan and fund providing for the families of deceased members.

A transfer of membership may be made upon submission of the name of the candidate to the Committee on Admissions and the approval of the transfer by two-thirds of the entire Committee, subject to certain conditions. There is no general or other right to transfer or pledge membership in the Exchange and no right or privilege in connection therewith which may be exercised in the state of Ohio.

Any member may be suspended from the membership and made ineligible for readmission or may be

expelled from membership by the vote of two-thirds of the existing members of the Governing Committee for certain causes stated in the Constitution.

Dealing upon any other Exchange in the City of New York or publicly outside of the Exchange, either directly or indirectly, in securities listed or quoted on the Exchange, is forbidden and makes the offender liable to suspension or expulsion as the Governing Committee may determine.

The Secretary keeps a ledger containing the names of all Members of the Exchange, with dates of their admission and transfer of membership. No member receives or has any certificate or share of membership or interest in assets, and the plaintiff has not in Ohio, or elsewhere, any such certificate or share which can be by him sold, transferred, assigned, encumbered or used. The only evidence of plaintiff's membership in the Exchange possessed by him is a letter to him from the Secretary notifying him of his election.

The New York Stock Exchange owns no assets of any kind within the state of Ohio, and any property of any kind belonging to it is located wholly and permanently within the state of New York.

The plaintiff is a co-partner with Walter B. Powell under the firm name of Anderson & Powell, formed for the purpose of and dealing in investment securities with an office in Cincinnati, and the plaintiff and his co-partner as aforesaid have paid and will pay, when due, all taxes properly assessed against them.

Nevertheless the defendant, Peter W. Durr, Auditor of Hamilton County, Ohio, has notified the plaintiff that he intends attempting to value plaintiff's privilege or franchise of membership in said New York Exchange and of listing the same on the tax duplicate against the plaintiff, and he will do so, unless enjoined, and the defendant, Charles C. Cooper, Treasurer of Hamilton County, Ohio, will, upon said membership being listed on the tax duplicate, attempt to collect the taxes thereon for the years 1915 and preceding and also for years following, unless enjoined.

Plaintiff says the New York Stock Exchange has been in existence for almost a hundred years and membership therein has been declared not to be property within the general property tax laws of the state of New York; neither has any attempt been made, so far as plaintiff has any knowledge, by taxing officials in the state of Ohio or elsewhere, to levy or collect a tax from any person upon his membership in said Exchange; although numerous persons in Ohio have for many years been members of such Exchange. Should the defendants be permitted to list and collect taxes against the plaintiff by reason of his membership in said Exchange, not alone will there be numerous suits, but the value inherent in plaintiff's membership in said Exchange will be greatly diminished thereby.

Plaintiff further says that the levying and collection of taxes on plaintiff's privilege of dealing in New York City in certain securities, that is, on his

privileges arising from membership in the New York Stock Exchange or any incident thereof, if regarded as property, is an attempt to levy and collect taxes on property wholly outside the state of Ohio, and is without warrant of law and amounts to a taking of private property without due process of law in violation of the Constitution of the state of Ohio, and of Article I, Section 1 thereof, and of Article I, Section 19 hereof, and also Article XII, Sections 2 and 5 thereof, in that the plaintiff is not taxed by uniform rule nor by a tax levied in pursuance of law.

Said listing, assessment and collection of taxes, if permitted, being without warrant of law, constitutes a taking of property without due process of law, and denies to plaintiff, a citizen of the United States, the equal protection of the laws, in violation of plaintiff's rights under the Constitution of the United States and of Article I, Section 8 thereof, Article IV, Section 2 thereof, Article XIV, Section 1 hereof, in addition to and amendment of said Constitution.

By reason of the foregoing, the multiplicity of suits and diminished value of plaintiff's rights, the plaintiff is wholly without remedy at law and except by the injunctive process of this Honorable Court.

WHEREFORE, plaintiff prays that a restraining order or temporary injunction issue against each of the defendants, enjoining the defendant, Peter W. Durr, Auditor of Hamilton County, Ohio, from listing or attempting to list on the tax duplicate, himself or by others, any additional property of the

plaintiff for the year 1915 or years preceding, and ordering him to desist from listing or attempting to list same on the tax duplicate; that said defendant, Peter W. Durr, be enjoined from attempting to list as taxable property in Hamilton County, Ohio, plaintiff's membership in the New York Stock Exchange for any of said years, or for the year 1916 or thereafter; that the defendant, Charles C. Cooper, treasurer of Hamilton County, Ohio, be likewise enjoined from and ordered to desist from collecting or attempting to collect, himself or through others, any taxes additional to those already assessed against plaintiff for the year 1915 or any years preceding, and from collecting taxes levied or assessed by reason of plaintiff's membership in the New York Stock Exchange for said years, for the year 1916, or any year following; that it be adjudged and declared plaintiff's membership in said Exchange is not property subject to taxation in the state of Ohio; that upon final hearing said injunction may be made perpetual against the defendants, and each of them; that the plaintiff recover his costs and for such other and further relief as shall, to the Court, seem just and right.

Murray Seasongood,
Attorney for Plaintiff.

(Duly verified.)

---

**ANSWER.**

(Filed April 20, 1916.)

Come now the defendants, Peter W. Durr and Charles C. Cooper, and admit that they are respec-

tively and duly elected, qualified and acting Auditor and Treasurer of Hamilton County, Ohio. Defendants further admit that Plaintiff was a resident of Hamilton County, Ohio, and is and has been for five years last past a member of the New York Stock Exchange; that this exchange is an unincorporated association of persons, the object of which is to furnish, and that it does furnish, exchange rooms and other facilities in New York City for the convenient transaction of their business by its members, as brokers.

Defendants further admit that the government of the exchange is vested in a governing committee, composed of the president and treasurer of the exchange and of forty members, elected as provided by the constitution and rules of the government of the exchange; no person can be admitted to membership in the exchange unless elected by a vote of two-thirds of the fifteen members comprising the committee on admissions; and that a person elected to membership must pay an initiation fee and before being admitted to the privileges of the exchange must sign the constitution, whereby he pledges himself to abide by the same and all subsequent amendments thereto.

Defendants admit that the dues of members are fifty dollars semi-annually exclusive of fines and all assessments for the gratuity fund, which is a plan and fund for providing for families of deceased members.

Defendants further admit that a transfer of membership may be made upon submission of the name of the candidate to the committee on admissions and the approval of the transfer by two-thirds of the entire committee, and that members are prohibited by the Constitution from dealing upon any other exchange in the City of New York or publicly outside of the exchange, either directly or indirectly, in securities listed or quoted on the exchange and that the violator of such rule is liable to suspension and expulsion as the governing committee may determine.

Defendants also admit that the secretary keeps a ledger containing the names of all members of the exchange, with dates of their admission and transfer of membership and that no member receives or has any certificate representing or certifying to such membership or interest in the assets of said exchange, but the only evidence of plaintiff's membership possessed by him is to be found upon the books of said stock exchange and in the letter to him from the secretary notifying him of his election.

Defendants admit that the plaintiff is a co-partner with Walter B. Powell under the firm name of Anderson & Powell and that said partnership is formed for the purpose of, and said partners are now engaged in, the dealing in investment securities and the stocks, bonds and other securities listed on the New York Stock Exchange, with an office in the City of Cincinnati; and that the defendant, Peter W. Durr, as Auditor of Hamilton County, Ohio, has

notified the plaintiff that he intends to value and list for taxation, on the tax duplicate against the plaintiff, said plaintiff's seat on the New York Stock Exchange for the year 1915 and preceding years to and including the year 1911, but not prior thereto.

Defendants deny each and every allegation contained in plaintiff's petition not hereinbefore specifically admitted to be true.

Further answering defendants say that for many years prior to the present time and for the entire period from 1910 to the present time, the plaintiff has been engaged in the business of a broker and dealer in stocks, bonds and securities and that he has established a large business and clientele for the purchase and sale of stocks, bonds and securities listed and dealt in on the New York Stock Exchange and that said plaintiff has held himself out and represented to said clientele and the public at large as furnishing proper, convenient and ample facilities for the transaction of all kinds of investment business and the purchase of all kinds of stocks and bonds.

Defendants say that prior to April, 1911, the plaintiff purchased a seat on the New York Stock Exchange believing and intending that he would thereby obtain additional facilities for the transaction of his business, increase his ability to serve his clients and, by virtue of the ownership of such seat on the New York Stock Exchange, would increase and extend such business, and that the ownership of such seat on the New York Stock Exchange has

in fact materially increased said facilities and ability to serve plaintiff's clients and has served to increase his business, establish his position in the business world and increase the profits arising from said business. Defendants are informed, and so allege the fact to be,, that the plaintiff paid for said seat on the New York Stock Exchange, in addition to an initiation fee of two thousand dollars and annual dues, the sum of sixty thousand dollars which then constituted and was the recognized market value for such seats, and that such sum was so paid and such seat on said New York Stock Exchange was so purchased principally that plaintiff might secure the business advantages arising from or attributable to such membership on the New York Stock Exchange.

Defendants aver that in addition to the ordinary business advantages connected with membership on the New York Stock Exchange there is an insurance feature known as the Gratuity Fund Plan whereby approximately ten thousand dollars is contributed to the family of any member who dies in good standing as a member of such stock exchange. There is further a security for the fulfilment of contracts made with stock exchange members in that the value of the membership of each member is first liable to the settlement of contracts made with other members thus insuring to the extent of the value of such membership, the financial responsibility of members in their mutual dealings.

Defendants further aver that subject to the acceptability of the transferee by the members of the

membership committee, all memberships in the New York Stock Exchange are transferable by the voluntary act of transfer or by will and that in case of transfer by a member voluntarily, by death or by the Governing Committee, the net proceeds, after payment of dues, fines and member creditors, are turned over and go to the member or his estate, and that membership in the New York Stock Exchange, or seats thereon, have from time to time a definitely established and well recognized market value which is ascertainable from current quotations of such sales. Subject to the condition that each applicant must be at least twenty-one years of age, must be a citizen of the United States, must pay an initiation fee of two thousand dollars and must be acceptable to two-thirds of the entire membership committee: such seats on said stock exchange are transferable for a consideration at the will of the member.

Defendants further allege that in the transaction of the business of brokers in stocks and bonds a differentiation is made between members and non-members in that business is transacted by members for the account of other members at a commission of not less than 1/32 of 1% while a commission of not less than 1/8 of 1% is charged to non-members. Firms or co-partnerships in which one member owns a seat are entitled to have business transacted at rates prescribed for members.

Plaintiffs aver that by reason of the transferability and market value of said seat on the New York Stock Exchange and the manifest business advan-

tages arising from such membership and the additional facilities for the convenient and more profitable transaction of the business of the members, the ownership of such seat on or membership in such New York Stock Exchange constitutes personal property within the definition of General Code, Section 5325 and an investment within the provisions of General Code, Sections 5328 and 5372.

WHEREFORE, defendants pray that the temporary restraining order heretofore issued herein may be dissolved, that the plaintiff's petition may be dismissed and that judgment may be rendered for these defendants for their costs herein expended and for all other legal or equitable relief to which defendants may be entitled.

Peter W. Durr,
Auditor of Hamilton County.
Charles C. Cooper,
Treasurer of Hamilton County.
By Campbell, Hickenlooper, Hauck
& Capelle, Attorneys.

(Duly verified.)

---

**REPLY.**

(Filed by leave June 16, 1916. Minute 2796.)

Now comes the plaintiff, and by leave of Court first had, files his reply as follows: The plaintiff denies that memberships in the New York Stock Exchange are transferable by will, and says that such memberships are a mere personal privilege or license to buy and sell at meetings of the Exchange

in New York City, and not elsewhere; that such membership is not subject to execution, and can not be pledged or used as collateral, and that the same can not be willed.

Plaintiff denies that the ownership of such a seat or membership constitutes personal property within the definition of General Code 5325, and denies that it is an investment within the provisions of General Code, Sections 5388 and 5372, and on the contrary says it is not property within the State of Ohio, and is not property within the meaning of the taxation laws of Ohio.

Plaintiff further says that since filing the petition in this case, he has made inquiry in a number of states whether such memberships in the New York Stock Exchange have been taxed or attempted to be taxed, and has not heard of any taxation or attempted taxation of such seats. Plaintiff further says the local rule of taxing officials has uniformly been that such seats were not subject to taxation, and that memberships in labor unions, social clubs, the Associated Press, Masonic and fraternal orders, commercial clubs, lodges, Chambers of Commerce, and voluntary business associations generally, have not been and will not be taxed or attempted to be taxed, and the same is true of saloon licenses, the privilege of practicing law, medicine or other professions or callings, and membership in legal, medical and kindred associations, and that the attempted taxation of his personal privilege or license is an unjust discrimination, constituting a taking of property without due process of law, and not a taxation

by uniform rule, all in violation of the Constitutions of the State of Ohio and of the United States.

Wherefore, plaintiff prays as in his petition.

Murray Seasongood,
Attorney for Plaintiff.

(Duly verified.)

---

## TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES IN COURT OF COMMON PLEAS.

(Filed in Court of Appeals May 15, 1918.)

To April 10th 1916.

Petition filed March 30th 1916.

Action for restraining order and temporary and final injunction and for all proper relief.

1916, Mar. 30 (Jan. Term). Min. 3851: Temporary restraining order allowed. Bond $500.00.

To the Clerk:—Let temporary restraining order issue as prayed for upon Plaintiff giving bond in the sum of $500.00 to the satisfaction of Clerk.

Alfred K. Nippert,
Judge Court of Common Pleas.

1916, Mar. 30. Bond 246, in Bond Book 21, in $500.00 given. (See Safe.)

1916, Mar. 30. Summons issued endorsed: Injunction allowed, Bond in $500.00 given, A. E. B. Stephens, Clerk, by Albert Swing, Deputy.

1916, Apr. 10. Summons returned endorsed: Received by George F. Schott, Sheriff Hamilton County, Ohio, Mar. 30-1916, 2:58 P. M.

1916, March 30th. Served the within named defendants Peter W. Durr, as Auditor and Charles C.

Cooper as Treasurer of Hamilton County, Ohio, by delivering a true copy of this writ with all the endorsements thereon personally to each of them at 3:50 o'clock P. M. George F. Schott, Sheriff Ham. Co., Ohio, by Geo. Paul, Deputy. Sheriff Fees, $1.32.

1916, Apr. 20. Answer of defendants filed.

1916, June 16 (Apr. Term). Min. 2796: Leave given plaintiff to file reply.

1916, June 16. Reply filed.

1917, Mar. 15 (Jan. Term). Min. 2760: Application for Official Stenographer filed and allowed.

M. Seasongood, Attorney for Plaintiff, and Smith Hickenlooper, Attorney for Defendant, request the services of an Official Stenographer to make a full report of the testimony and proceedings in this case.

Signed, M. Seasongood for Plff.

Smith Hickenlooper, Ass't Pros. Atty, for Defts.

The above request for an Official Steographer is granted and J. F. Beam is appointed to make a full report of the testimony and proceedings.

1918, Apr. 30 (Apr. Term). Min. 621: Final Decree granting perpetual injunction, at defendants costs. Defts. except and declare intentions to appeal. Bond $250.00.

This cause came on to be heard on the pleadings, the evidence and the arguments of counsel and was taken under consideration by the Court.

It appearing to the Court that the term of office of Peter W. Durr as auditor of Hamilton County, Ohio, has expired since the filing of this action and that E. S. Beaman has been duly elected and qualified as his successor and is now acting as such, said

E. S. Beaman, as auditor of Hamilton County, Ohio, may be and he hereby is substituted as defendant in place of said Peter W. Durr.

It further appearing to the Court that the plaintiff is entitled to the relief prayed for in the petition, on the law and the evidence in this case, it is hereby ordered, adjudged and decreed that the defendants be and they hereby are perpetually enjoined from acting as follows:

The said E. S. Beaman, auditor of Hamilton County, Ohio, and his successors, from listing or attempting to list on the tax duplicate, himself or by others, any additional property of the plaintiff for the year 1915 or years preceding, and ordering him to desist from listing or attempting to list same on the tax duplicate; and from attempting to list as taxable property in Hamilton County, Ohio, plaintiff's membership in the New York Stock Exchange for any of said years, or for the year 1916, or thereafter; and the defendant, Charles C. Cooper, treasurer of Hamilton County, Ohio, and his successors in office are likewise enjoined from and ordered to desist from collecting or attempting to collect, himself or through others, any taxes additional to those already assessed against plaintiff for the year 1915 or any years preceding, and from collecting taxes levied or assessed by reason of plaintiff's membership in the New York Stock Exchange for said years, for the year 1916, or any year following.

It is further adjudged and declared that plaintiff's membership in said New York Stock Exchange is not property subject to taxation in the state of Ohio.

The defendants herein are hereby ordered to pay the costs of this action taxed at $———.

To all of which the defendants, by their counsel, except.

And the defendants hereby declaring their intention to appeal from this decree, the Court hereby fixes the appeal bond to be given by the defendant, Edmund S. Beaman, as Auditor of said county, in the sum of $250.00 to be approved by the Clerk of this Court.

1918, May 13. Bond 19 in Bond Book 24 in $250.00 for Appeal given. (See Safe.)

(Appeal bond attached.)

(Duly certified.)

Know all Men by these Presents: That we, Edmund S. Beaman, Auditor of Hamilton County, as principal and Hartford Accident and Indemnity Company, as surety, of the County of Hamilton and State of Ohio, are held and firmly bound unto John M. Anderson in the just and full sum of Two Hundred and fifty ($250.00) dollars, good and lawful money of the United States of America; for the payment whereof well and truly to be made unto the said John M. Anderson we do hereby bind ourselves, and each of our heirs, executors and administrators, firmly by these Presents. Sealed with our seals, and dated at Cincinnati, this 13th day of May, Anno Domini, one thousand nine hundred and eighteen.

Whereas, in the Term of April, A. D. 1918, of the Court of Common Pleas, held at the Court House in the City of Cincinnati, within and for the County of

Hamilton aforesaid, by the consideration of the Honorable John A. Caldwell, one of the Judges of the said Court, sitting in separate session, the said John M. Anderson recovered a Judgment against the said Edmund S. Beaman, as Auditor of Hamilton County, Ohio, from which said Judgment the said Edmund S. Beaman, as Auditor of Hamilton County, Ohio, has given notice of appeal to the Court of Appeals of the First Appellate District of Ohio, next to be holden within and for the said County of Hamilton.

Now the condition of the above obligation is such, that if the said Edmund S. Beaman, as Auditor of Hamilton County, Ohio, shall prosecute said appeal to effect, and abide and perform the Order and Judgment of the Appellate Court, and shall pay all moneys, costs and amages, which may be required of or awarded against him by the said Court, then, and in such case, the said obligation to be void and of no effect, otherwise to be and remain in full force and virtue in law.

Signed, Sealed and Acknowledged in the presence of Albert Swing.

E. S. Beaman, Aulitor Hamilton Co., O. (Seal.)

Hartford Accident and Indemnity Company, by Fred H. Pfeffer, Attorney-in-fact. (Seal.)

Filed May 13, 1918, and approved May 13th, 1918.

Fred E. Wesselmann,

Clerk Court Common Pleas, Hamilton Co., O.

By Albert Swing, Deputy.

62 Supreme Court of Ohio.

JOHN M. ANDERSON, Plaintiff in Error,

vs.

PETER W. DURR, as Former Auditor, et al.

*Motion for an Order Directing the Court of Appeals to Certify Its Record.*

John M. Anderson moves the Court for an order directing the Court of Appeals of Hamilton County, to certify its record in case No. 1313, John M. Anderson, plaintiff, vs. Peter W. Durr, etc., et al. defendants, on the ground:

(1) The case is one of public or great general interest;

(2) Error has intervened.

As to (1), the question involved is: whether a resident of Ohio is taxable on a membership, owned by him, in the New York Stock Exchange, an unincorporated association of persons doing business in a particular building in New York City, and not elsewhere.

As to (2), the Common Pleas Court held (20 N. P. (n. s.) 538,) the essence of the right conferred by membership is a mere personal privilege to do business in another State and enjoined enforcement of a tax on Mr. Anderson's membership. The Court of Appeals reversed the decision and dismissed the petition for injunction. (29 O. C. A. 465.)

The Court of Appeals, disregarded fundamental rule of construction that laws imposing taxes are to be construed in favor of the subject, under the mistaken view that such is not the rule of construction in Ohio.

The Court also disregarded the admission to the Common Pleas Court of the then Assistant Prosecuting Attorney in charge of this case, that, in his opinion, under the taxing laws of Ohio, this property was not included. The Court also failed to take account
63 of Section 5322 of the tax laws of Ohio, which defines "real property" as including not only land itself, but

* * * "all rights and privileges belonging, or appertaining thereto."

The Court of Appeals was divided on the meaning of Section 5325 as applied to this membership, the judge writing the opinion differing with his colleagues and finding that (p. 473) it was not specified therein.

It is also contended that, assuming the tax laws of Ohio, properly construed, would include such a seat, for Ohio to attempt to tax property beyond the boundaries of the State and permanently located in another State, under the fiction that the situs of personal property is at the domicile of the owner, would deprive the owner

of his property without due process of law, in violation of the Ohio and United States Constitutions. It is further contended that property of a somewhat similar character, but concededly located in Ohio, is not taxed and that the result is an unjust discrimination in violation of constitutional rights. These contentions are set forth in No. 16234 in this Court, John M. Anderson, Plaintiff in Error, vs. Peter W. Durr, etc., et al, Defendants in Error, and this motion is filed only as a precaution, in case it should be decided error does not lie.

It is urged that this motion be passed until the hearing of the error case.

MURRAY SEASONGOOD,
*Attorney for Movant.*

64 [Endorsement:] #16234. Supreme Court of Ohio. John M. Anderson, Plaintiff in Error, vs. Peter W. Durr, as former Auditor, et al., Defendants in Error. Motion for an Order Directing the Court of Appeals to Certify its Record. Filed Apr. 29, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk.

65 Supreme Court of Ohio.

No. 16,234.

JOHN M. ANDERSON, Plaintiff in Error,

v.

PETER W. DURR, as Former Auditor, E. A. Beaman, as Auditor and Charles C. Cooper, as Treasurer of Hamilton County, Ohio, Defendants in Error.

*Supplemental Petition in Error.*

The Plaintiff in error, John M. Anderson, supplements the petition in error, as follows:

This case tried on appeal in the Court of Appeals for the First Appellate District of Ohio, in December, 1918, and final judgment was rendered against this plaintiff in error in said Court, on February 20, 1919.

Thereafter, on February 25, 1919, the Council of the City of Cincinnati, State of Ohio, passed an ordinance No. 41—1919, entitled:

"To levy an annual occupation tax upon persons, associations of persons, firms and corporations, carrying on certain trades, professions, occupations and businesses in the City of Cincinnati, by amending Sections 812–1 to 812–10, both inclusive, of the Code of Ordinances of the City of Cincinnati, and by ordaining Supplementary Sections 812–11 to 812–15, inclusive."

which said ordinance was approved by the Mayor of said City on February 25, 1919. Under the terms of said ordinance, this plaintiff

is and will be taxed Fifty Dollars ($50.00) every year for carrying on the business of a broker. Brokers in said ordinance are listed in Schedule H thereof, and by the terms of said ordinance all the provisions thereof in so far as the same relate or apply to the
66 trades, professions, occupations and businesses mentioned in Schedule H, including that of plaintiff in error, took effect and were in force from and after the first day of May, 1919.

Plaintiff in error further *days* that nine-tenths of the business conducted by him as a broker, and for which he pays an occupational tax as aforesaid, is New York Stock Exchange business.

Wherefore, plaintiff in error prays as in his petition in error.

MURRAY SEASONGOOD.

STATE OF OHIO,
*Hamilton County, ss:*

Murray Seasongood, being first duly sworn, deposes and says, he is attorney for John M. Anderson, plaintiff in error; that said John M. Anderson, is, at the present time, absent from the State of Ohio and that the facts stated in the foregoing supplemental petition are true as affiant believes.

MURRAY SEASONGOOD.

Subscribed and sworn to before me, this 4th day of September, 1919.

A. F. DRIEMEYER,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

67 Supreme Court of Ohio.

No. 16,234.

JOHN M. ANDERSON, Plaintiff in Error,

vs.

PETER W. DURR, as Former Auditor, E. S. Beaman, as Auditor and Charles C. Cooper, as Treasurer of Hamilton County, Ohio, Defendants in Error.

*Application for Rehearing.*

The plaintiff in error, John M. Anderson, respectfully applies to the court for a rehearing of the above entitled cause, for each of the following reasons:

First. The great importance of the case. The case is important to the plaintiff in error; since, though there has been no concealment by him, doubtless, an attempt will be made to assess him many thousands of dollars in taxes, interest and penalties, on the entire value of his seat, for all the year since 1911.

But, the case is also important to other citizens of Ohio, and else-

where, holding such seats, and similar analogous privileges, exercisable in or out of Ohio.

Second. The opinion is the first in the United States which taxes memberships outside of the state where the exchange is located, although such exchanges, and memberships therein, outside of New York, have existed for more than a hundred years.

Third. In Ohio, there has been a uniform practical construction, for more than thirty-five years, by tax payers and tax officials, that such memberships are not included in the taxation laws of Ohio (R. 40). Besides, in this case, we have the counsel for the taxing officials who originally gave the opinion that such memberships are taxable, coming to a different conclusion and so advising the trial court, after the case had been submitted, (Exhibit A), letter of Hon. Smith Hickenlooper, Assistant Prosecuting Attorney (now Judge of the Superior Court) to Judge Caldwell, dated June 28, 1917, (R. 10–12).

68 This court has emphasized the importance of practical construction of statutes by the persons charged with their enforcement, as an aid to interpretation. So has every other court and the practical construction that New York Stock Exchange memberships are not taxable outside the state, has been uniform and continuous for more than one hundred years. (R. 40).

Yet, in the case at bar, this uniform and long continued practical construction is not referred to, although it was strongly relied upon by plaintiff in error. Moreover, it is urged, a decision so novel and momentous should not depend on the concurrence of a bare majority of the court. The Chief Justice sat at the argument, but, from the bench, did not vote to affirm. Judges Donahue and Wanamaker were not present at the argument.

Fourth. The court, in the opinion, recognizes the rule of strict construction of taxing statutes; yet, it is suggested with deference, does not follow that rule. Surely, where the States of New York (people, ex rel Lemmon v. Feitner, 167 N. Y., 1-7 bot.-8) and Maryland (Mayor and City Council v. Johnson, 96 Md., 737) hold such membership not included in the general taxing laws, even where the exchange is located, and Minnesota, (State, ex rel Goetzman v. Minn. Tax Commission, 136 Minn., 260) and the Supreme Court of the United States (Rogers v. Hennepin County, 240 U. S., 184) hold that the situs of such membership is where the Exchange is located; and where this court, (in Chisholm v. Shields, 67 O. S., 374), says:

"So that the word 'otherwise' Sec. 2731" (now Sec. 5328 G. C.), "includes only such property or investments as are specifically mentioned and required to be taxed in the subsequent sections, and property or investments not so mentioned can not be taxed. And in so specifically mentioning and requiring to be taxed the property must be such as is ordinarily included in the description given, and not such as can be brought within the description by a process of reasoning only, or by a strained construction. The general assembly

must be presumed to be able to fairly describe such property as it desires to tax without resorting to a strained construction, or a course of fine reasoning."

and this court also holds, (Hubbard v. Brush, 61 O. S., 252; Heintz Co. v. Benham, 95 O. S., 110), the situs for taxation of choses in action, is where they are localized; and where Sec. 5322 (Brief
69 Appendix p. 46) defines "Real Property" for the purposes of taxation, as including:

buildings * * * and all rights and privileges belonging or appertaining thereto."

and we have a privilege inseparably connected with the Exchange building in New York, it requires a liberal construction of the taxing statutes in favor of the State and not in favor of the citizen to say that a seat on the New York Stock Exchange is "personal property" in Ohio. The Court's quoted excerpts from Lee v. Sturges, 46 O. S., 153, were written in connection with the facts of a case, entirely different from those in the case at bar. The taxing statute expressly includes "Investments in Stocks." It was sought to take a particular investment in stocks out of the statute, by an exemption; but the corollary of the rule that taxing statutes are to be strictly construed is the rule that exemptions from taxation are to be narrowly construed against the person claiming the exemption. (Watterson v. Halliday, 77 O. S., 150).

Fifth. The whole privilege of membership in the New York Stock Exchange is the right to do business there in person or by others. The opinion of this court (pp. bot. 11-12) says:

"Now, in this case the right secured to a member to go to the Stock Exchange in New York and there conduct his business in the stocks in the manner prescribed is doubtless the most valuable right of membership. But as incident to his membership he is also granted the right to deal with and through other members on certain fixed percentages and methods of division of commissions. This right to secure the services of other members at a lower rate and to split commissions is a very valuable right. By it the plaintiff in Cincinnati is enabled to properly hold himself out to the world as a member entitled to all the privileges and able to secure all of the advantages of the New York Stock Exchange. All of which advantages are denied to non-members. He is thus enabled to conduct from and in his Cincinnati office a large business through other members in New York. All of which is regularly and properly done.

"The situs of the valuable contractual property right of plaintiff is at the domicile of plaintiff in Cincinnati and the State of Ohio has the right to tax it here."

If the right to do business in New York on the Exchange is "the most valuable right of membership," why should a mere "incident" to membership make what gives the right substantial value, taxable.
70 If the court would give further time for re-argument counsel for Mr. Anderson feels he could more fully explain

just what are the privileges of a non-resident member of the Exchange. Such non-resident member is in no different position from one who has a wire connection with a member of the Exchange in New York, so far as concerns the buying and selling of stocks. In either event, the business is transacted in New York. Many Cincinnati brokers, not members of the Exchange, advertise:

"Private Wire Service, connecting our office with New York and other Eastern Cities for the prompt execution of orders upon New York Stock Exchange."

The Cincinnati broker having no membership in the New York Exchange, can buy stock through a New York member of the Exchange, providing the member charges the Cincinnati broker the full commission, he would charge any one else. The Cincinnati broker then charges his client an additional commission for the services rendered. This is done by numerous brokers and, of course, they are not taxed on the privilege of doing this (except the occupational tax which all brokers pay in Cincinnati.)

Mr. Anderson, on the other hand, transmits the order to a member of the Exchange and is allowed to divide with him, the commission earned in New York. He may, or may not, charge his client less than the Cincinnati Broker, not a member of the Exchange, would do, but the commission, in both instances, of Mr. Anderson and the non-member, is earned in exactly the same way, in New York.

It is not true, therefore, as the opinion of the court states, that Mr. Anderson is able to secure all of the advantage of the New York Stock Exchange and that these advantages are denied to non-members.

Neither is it true that he conducts the business in his Cincinnati office. He forwards the business from his Cincinnati office, but so does a non-member of the Exchange, having wire connection to New York. The actual business, from which the commission results, is transacted in New York.

In the case at bar, Mr. Anderson is not asking for an exemption from taxation. He maintains, his privilege to do business in
71 New York is not included in the taxing statutes of Ohio.

No state has the power to tax the privilege of doing business in another state. In Burt v. Battle, 31 O. S., 116, the first paragraph of the syllabus is:

"A statute should not receive a construction which makes it conflict with the Constitution, if a different interpretation is practicable."

In Fox v. State of Washington, 236 U. S., 273, the third paragraph of the syllabus is:

"Statutes should be construed, so far as they fairly may be, in such a way as to avoid doubtful constitutional questions; and this court presumes that state laws will be so construed by state courts."

See, also, United States v. Jin Fuey Moy, 241 U. S., 401.

In Toledo Commercial Company vs. The Glenn Mfg. Co., 55 O. S., 217 this court held that the act requiring foreign corporations to obtain a certificate from the Secretary of State before doing business, did not apply to a foreign corporation, whose business within the

state consisted merely of selling through traveling agents and delivering goods manufactured outside the state.

There, at least part of the business, namely, making sales, was done in this state, whereas, in the case at bar, none of the business is, or can be done, in this state.

Sixth. Constitutional Questions.—It is contended by plaintiff in error, the decision of the court, if adhered to, deprives him of his property without process of law in violation of the Ohio and Federal constitutions; makes the Ohio taxation statutes unconstitutional in taxing property outside the state; in discriminating unfairly against plaintiff in error and in placing a burden on the privilege of doing Interstate Commerce.

These objections have been persistently presented from the beginning of the litigation. The court's summary of the petition, (opinion p. 4) omits (R. 18), the claim of denial of equal protection of the laws and violation of Art. 1, Sec. 8 (the Commerce clause) of the Federal constitution.

The summary of the reply in the opinion (p. 7) omits the
72 contentions respecting discrimination, stated (R. 56) as follows:

"Plaintiff further says the local rule of taxing officials has uniformly been that such seats were not subject to taxation, and that memberships in labor unions, social clubs, the Associated Press, Masonic and fraternal orders, commercial clubs, lodges, Chambers of Commerce, and voluntary business associations generally, have not been and will not be taxed or attempted to be taxed, and the same is true of saloon licenses, the privilege of practicing law, medicine or other professions or callings, and membership in legal, medical and kindred associations, and that the attempted taxation of his personal privilege or license is an unjust discrimination, constituting a taking of property without due process of law, and not a taxation by uniform rule, all in violation of the Constitutions of the State of Ohio and of the United States."

The fifteenth assignment in the petition in error (R. 5) in the court is:

"(15) The said court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States:

"(a) Since the essence of membership in the New York Stock Exchange is a privilege of doing business on certain real estate in New York and not elsewhere and for Ohio to attempt to tax same constitutes attempted taxation of property permanently outside the State of Ohio and a taking of this plaintiff in error's property without due process of law, in violation of Article XIV, Section 1 thereof, in addition to an amendment of the Constitution of the United States;

"(b) In depriving this plaintiff in error of the equal protection of the laws, other property, admittedly in Ohio, of a somewhat analogous character not being taxed, in violation of Article IV, Section 2 thereof;

"(c) In illegally interfering, if there is anything in Ohio, which plaintiff in error denies, with Interstate Commerce, violating Article I, Section 8 of the Constitution of the United States;"

We rely very much on Louisville & Jeffersonville Ferry Co. v. Kentucky, 213 U. S., 200, and Buck v. Beach, 206 U. S., 393, 401.

It is earnestly contended, Ohio may not tax the privilege of doing business in New York, whether it be a ferry franchise or a right to do business in a certain building, only.

Then, too, why should this plaintiff in error be singled out for taxation, when analogous privileges are not taxed?

One of the assignments of error in this court, is: (R. 4).

"(13) The said court erred in disregarding the fact that this plaintiff in error pays taxes under the Blue Sky Law and will
73 be taxed as a broker under the occupational tax authorized by the Charter of the City of Cincinnati."

This court has upheld the occupational tax of the City of Cincinnati, passed after this case was tried in the court below. Under this tax, (Ordinance No. 41, passed February 25, 1919) the plaintiff is taxed on the privilege of carrying on the business of a broker $50.00 a year. Nine-tenths of Mr. Anderson's business, on which he is thus taxed, is his New York Stock Exchange business.

In State, ex rel. Saul Zielonka, City Solicitor of Cincinnati, vs. George P. Carrel, Auditor, reported in O. L. R. Advance Sheets No. 47, p. 505, full opinion not yet available, the syllabus is:

"1. The State of Ohio, under the provisions of Section 10, Article XII, of the Constitution, has authority to levy excise taxes in the form of an occupational tax.

"2. Under the grant of power of local self-government provided for in Section 3, Article XVIII of the State Constitution, the city of Cincinnati, as long as the State of Ohio through its General Assembly does not lay an occupational tax on businesses, trades, vocations and professions followed in the state, may raise revenue for local purposes, through the instrumentality of occupational taxes.

"3. The ordinance of the city of Cincinnati providing that an annual tax shall be laid upon all persons, associations of persons, firms and corporations pursuing any of the trades, professions, vocations, occupations and businesses therein named, is a valid exercise of the legislative power of such city."

Surely, Mr. Anderson should not be singled out to pay:

(1) a so-called property, but really a license tax of one and one half percent on the whole value of his right to carry on the brokerage business on the New York Stock Exchange;

(2) the Blue Sky Law State tax; and,

(3) the Cincinnati occupational tax on the same privilege.

This is double, or triple taxation. The Cincinnati occupational tax ordinance was upheld by this court, on the ground the state makes no similar tax. Yet, by the decision in the case at bar, the state does make such tax.

This discrimination and multiple taxation on the same privilege was, apparently, not considered by the court. The repugnancy of this decision and the occupational tax decision supra, can be, it is asserted, plainly shown, if the Cincinnati ordinance may be treated as in the record and further argument is allowed.

74 Again, if there is any right in connection with this privilege, exercisable in Ohio, it is a right to do Interstate Commerce between New York and Ohio, which Ohio may not tax. The latest case is Union Tank Line Co. v. Wright, Comptroller General of Georgia, (249 U. S., 275) advance sheets May 5, 1919, which had not reached us when this case was argued.

These various points are not referred to in the opinion, and we earnestly request that we be given opportunity to emphasize them on a re-argument and make their application to the present opinion of the court, clear.

The character of a membership in the New York, or somewhat similar Exchange, has been accurately described in many decisions of many states.

White v. Brownell, 2 Daly, 329, 335, 355;
Ketcham v. Provost, 141 New York Supp., 437;
Bilton v. Hatch, 109 N. Y., 593;
Shannon v. Cheney, 156 Cal., 567, 570;
Lowenberg v. Greenebaum, 99 Cal. 162; and numerous others.

In all of thes cases, the peculiar character of the right is defined and referred to. None characterizes this unique species of property as "personal property," or a "chose in action." The right to enforce the rules of the Exchange is not what gives the membership value. The value lies in the opportunity of performing personal services, either directly, or through others, in New York.

*Conclusion.*

The case is of such far-reaching importance, has so many ramifications, all requiring much time to elaborate, and the result of the decision appears so burdensome and discriminatory, it is most earnestly urged opportunity be given to present the case in its manifold aspects more fully by re-argument.

Respectfully submitted.

MURRAY SEASONGOOD,
*Attorney for Plaintiff in Error.*

75 [Endorsed:] 16,234. Supreme Court of Ohio. John M. Anderson, Plaintiff in Error, vs. Peter W. Durr, as former Auditor and Charles C. Cooper, as Treasurer of Hamilton County, Ohio, Defendants in Error. Application for Rehearing. Filed Jul. 30, 1919. Supreme Court of Ohio. Frank E. McKean, Clerk. Murray Seasongood, Attorney for Plaintiff in Error.

76 Supreme Court of the State of Ohio, January Term, A. D. 1919.

No. 16234.

Title.

JOHN M. ANDERSON, Plaintiff in Error,

v.

PETER W. DURR, as Former Auditor, et al., Defendants in Error.

Action: Error to the Court of Appeals of Hamilton County.
Motion for an order directing the Court of Appeals of Hamilton County to certify its record.

Attorney for plaintiff in error, Murray Seasongood, Cincinnati.
Attorneys for defendants in Error, Louis H. Chapelle, Prosecuting Attorney; S. C. Roettinger, Assistant Prosecuting Attorney, Cincinnati, Ohio.

(*Transcript of Docket Entries.*)

Minute Book No. 28, page 34.

1919.

March 6th. Petition in Error and Waiver of Summons filed.
" " Court of appeals transcript, original papers and bill of exceptions filed.
" " Papers taken by Mr. Seasongood. April 25, 1919, returned.
April 25th. Printed record and proof of service filed.
" 29th. Motion for an order directing the Court of Appeals of Hamilton County to certify its record, receipt of notice and plaintiff's brief on motion filed.
May 13th. Plaintiff's printed briefs (12 copies) filed.
" " Proof of service filed.
May 24th. Defendant's printed briefs, (10 copies) and proof of service, filed.
May 27th. Defendant's printed briefs (2 copies) filed.
June 14th. Typewritten copies of opinion of court of appeals filed.
July 8th. Motion for an order directing the Court of Appeals of Hamilton County to certify its record, allowed. Journal No. 28, page 287.
" 8th. Judgment affirmed. Journal No. 28, page 295.
" 15th. Mandate Issued.
" " Original Papers sent to Clerk.
" 30th. Application (7 copies) for rehearing, and proof of service, filed.

Sept. 5th. Supplemental petition in error filed.
" 8th. Proof of service of supplemental petition in error on Prosecuting Attorney filed.
Dec. 23rd. Judgment modified as per entry. Journal No. 28, page 360.
" " Application for rehearing denied. Journal No. 28, page 361.

77 No. 16234. John M. Anderson vs. Peter W. Durr, et al.

1919.
Dec. 30th. Mandate pursuant to entry of December 23, 1919, issued.

1920.
Jany. 8th. Order allowing writ of error to United States Supreme Court. Hugh L. Nichols, Chief Justice. (Journal No. 28, page 363.)
" 8th. Petition for writ of error and order allowing writ, filed.
" " Assignment of errors filed.
" " Writ of Error filed.
" " Two copies of writ deposited for Clerk and defendants.
" " Bond in sum of $500.00, signed by plaintiff in error as principal, and by Royal Indemnity Company as surety, filed.
" " Citation issued for defendants, and taken by Murray Seasongood, Attorney for plaintiff in error.
" 12th. Citation and Acknowledgment of service filed.
" " Pr-ecipe for transcript and Acknowledgment of service filed.
Entry permitting copy of Supplemental Petition to be filed.

HUGH L. NICHOLS,
*Chief Justice.*

Journal No. 28, page 361.

78 No. 16234.

John M. Anderson v. Peter W. Durr, former Auditor, et al.

(*Transcript of Journal Entries.*)

1919.
July 8th. Motion for an order directing the Court of Appeals of Hamilton County to certify its record.
"It is ordered by the Court that this motion be, and the same hereby is, allowed." Journal No. 28, page 287.
July 8th. Error to the Court of Appeals of Hamilton County.
"This cause came on to be heard upon the

transcript of the record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by the Court that this cause be, and the same hereby is, affirmed: and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—.

Ordered, that a special mandate be sent to the Court of Appeals of Hamilton County, to carry this judgment into execution." Journal No. 28, page 295.

December 23rd. Error to the Court of Appeals of Hamilton County. It is ordered by the Court that the entry of judgment herein dated July 8, 1919, and recorded in Journal No. 28, page 295, be modified to read as follows:

July 8th, 1919: This cause came on to be heard upon the transcript of the record of the Court of Appeals of Hamilton County, and was argued by counsel, and by consent of all parties, presented to the court at the same time both upon the error proceedings and the certiorari proceeding. On consideration whereof, it is ordered and adjudged by this court that the judgment of the said Court of Appeals be, and the same is hereby, affirmed, in both of said proceedings.

And it appearing to the Court that there were reasonable grounds for said proceedings, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from plaintiff in error his costs herein expended, taxed at $—.

Ordered, that a special mandate be sent to the Court of Appeals of Hamilton County, to carry this judgment into execution.

To all of which plaintiff in error excepts.

Journal No. 28, page 360.

December 23rd. Application for a rehearing.

"It is ordered by the Court that the application for a rehearing filed herein be, and the same hereby is, denied."

Journal No. 28, page 361.

1920.

Jan. 12th. Entry permitting copy of supplemental petition to be filed.

"The supplemental petition in error heretofore filed herein, having been mislaid, but same hav-

ing been considered by the court in connection with the application for a rehearing, and a true copy thereof having been filed, by plaintiff in error, upon request of the court; Ordered, said copy of the supplemental petition in error be and it is, filed as of the date of filing, and to take the place of, the original petition in error."

HUGH L. NICHOLS,
*Chief Justice.*

Journal No. 28, page 364.

79 *Opinion.*

ANDERSON

vs.

DURR, Auditor, et al.

(No. 16,234. Decided July 8, 1919.)

Error to the Court of Appeals of Hamilton County.

Anderson brought suit against the defendants to enjoin the listing for taxation and the collection of taxes on the plaintiff's membership in the New York Stock Exchange for certain years.

The petition alleges that the plaintiff has been a member of the exchange for five years last past; that it is an unincorporated association of persons whose object is to furnish exchange rooms and other facilities in New York City for the convenient transaction of their business by its members as brokers; to maintain high standards of commercial honor and integrity among its members; to promote and inculcate just and equitable principles of trade and business; that in substance the privilege conferred by membership is to trade at the exchange in New York City and not elsewhere in certain securities listed on the exchange; that the government of the exchange is vested in a governing committee, composed of the president and the treasurer of the exchange and of forty members; that no person can be admitted to membership unless elected by the entire vote of two-thirds of the fifteen members comprising the committee on admission; that a person elected to membership must pay an initiation fee and must sign the constitution and pledge himself to abide by the same;

80 that the dues of members are $50, semi-annually, exclusive of fines and assessments for the gratuity fund, which is a plan and fund providing for the families of deceased members; that a transfer of membership may be made upon the submission of the name of the candidate to the committee on admissions, with the approval of the transfer by two-thirds of the entire committee, subject to certain conditions; that there is no general or other right to transfer or pledge membership in the exchange and no right or privilege in connection therewith which may be exercised in the state of Ohio

that any member may be suspended from the membership and made ineligible for readmission or may be expelled from membership by the vote of two-thirds of the existing members of the governing committee, for certain stated causes; that dealing upon any other exchange in the city of New York, or publicly, outside of the exchange, either directly or indirectly, in securities listed or quoted on the exchange, is forbidden; that no member has any certificate or share of membership or interest in the assets, and the plaintiff has not in Ohio or elsewhere any such certificate or share which can be sold, transferred, assigned or encumbered or used; that the only evidence of plaintiff's membership is a letter to him from the secretary notifying him of his election; that the exchange owns no assets in Ohio, and any property of any kind belonging to it is wholly and permanently in New York; that the plaintiff is a copartner with Walter B. Powell under the name of Anderson & Powell, a firm formed for the purpose of dealing in investment securities, with an office in Cincinnati, and plaintiff and his copartner, as aforesaid, have paid and will pay when due all taxes properly assessed against them; that the defendants will, unless enjoined, list the plaintiff's franchise in said exchange for taxation; that the New York Stock Exchange has been in existence for almost a hundred years and membership therein has been declared not to be property within the general property tax laws of New York, and no attempt has been made so far as plaintiff knows to tax it in Ohio or elsewhere; and that the levying of taxes on the plaintiff's privilege, if regarded as property, is an attempt to levy and collect taxes on property wholly outside of the state of Ohio and amounts to taking property without due process of law in violation of the Constitution of the State of Ohio and of the United States.

The answer of the defendants admits the membership of the plaintiff in the New York Stock Exchange and his residence in Hamilton county, Ohio; that the exchange is an unincorporated association of persons whose object is as stated in the petition; and that the membership therein is secured as stated in the petition, and dues and assessments for the gratuity fund paid as therein stated.

Defendants admit that a transfer of membership may be made by submission of the name of the candidate to the committee on admissions, upon approval, as the averments of the petition set forth; that the secretary keeps the ledger referred to with the names of all the members of the exchange and that the only evidence of the plaintiff's membership is to be found on the books of the exchange and in the letter from the secretary, as stated.

Defendants further admit that the plaintiff is a copartner with Walter B. Powell, under the name of Anderson & Powell, and that the partnership was formed for the purpose of, and said partners are now engaged in, dealing in investment securities listed on the New York Stock Exchange, with an office in the city of Cincinnati; and that the defendant Durr intends to list said membership for taxation in Hamilton county, Ohio; and defendants deny every other allegation in the petition.

Further answering the defendants say that for many years the

plaintiff has been engaged in the business of broker and dealer in stocks, etc., and has a large business and clientele for the purchase and sale of stocks, bonds and securities listed and dealt in on the New York Stock Exchange, and that plaintiff has held himself out and represented himself to said clientele and the public at large as furnishing proper, convenient and ample facilities for the transaction of all kinds of investment business and the purchase of all kinds of stocks and bonds; that prior to April, 1911, plaintiff purchased a seat on the New York Stock Exchange, believing and intending that he would obtain additional facilities for the transaction of his business, increase his ability to serve his clients, and by virtue
82 of the ownership of such a seat on the New York Stock Exchange would increase and extend such business; that the ownership of such a seat on the New York Stock Exchange has in fact materially increased said facilities and ability to serve the plaintiff's clients and has served to increase his business, establish his position in the business world and increase the profits arising from said business, that defendants are informed, and so allege the fact to be, that plaintiff paid for said seat, in addition to an initiation fee of $2,000 and annual dues, the sum of $60,000, which was the recognized market value for such seats, and that such sum was so paid that plaintiff might secure the business advantages arising from such membership on the exchange; that in addition to the ordinary business advantage connected with membership there is an insurance feature known as the "Gratuity Fund Plan," whereby approximately $10,000 is contributed to the family of any member who dies in good standing; that there is a further security for the fulfillment of contracts made with stock exchange members in that the value of the membership of each member is first liable to the settlement of contracts made with other members, thus insuring to the extent of the value of such membership the financial responsibility of the members in their mutual dealings; that subject to the acceptability of the transferee by the members of the membership committee all memberships are transferable by the voluntary act of transfer, or by will, and that in case of transfer by a member voluntarily, by
83 death, or by the governing committee, the net proceeds are turned over and go to the member or his estate; that such membership has a well-recognized market value which is ascertainable from current quotations; and that subject to the condition that each applicant must be at least twenty-one years of age, a citizen of the United States, and pay an initiation fee of $2,000 and be acceptable to two-thirds of the entire membership committee, such seats are transferable for a consideration at the will of the member.

Defendants further aver that in the transaction of the business of brokers in stocks and bonds a differentiation is made between members and nonmembers in that business is transacted by members on account of other members at a commission of not less than 1/32 of 1%, while a commission of not less than 1/8 of 1% is charged to nonmembers; that firms or copartnerships in which one member owns a seat are entitled to have business transacted at rates prescribed for members; and that by reason of the transferability and market

value of said seat and the manifest business advantages arising from such membership, and the additional facilities for the convenient and more profitable transaction of the business of the members, the ownership of such seat constitutes personal property within the definition of Section 5325, General Code, and an investment within the provisions of Sections 5328 and 5372, General Code.

For reply plaintiff denies that memberships are transferable by will and says that such memberships are a personal privilege
84 or license to buy and sell in meetings of the exchange in New York City and not elsewhere; that such membership is not subject to execution and cannot be pledged or used as collateral and cannot be willed; and denies that it is personal property within the definition of the sections of the General Code referred to.

On the trial of the cause the constitution of the New York Stock Exchange was offered in evidence, and a stipulation as to facts. The court of common pleas entered a decree and judgment for the plaintiff. On appeal the court of appeals found in favor of the defendants and dismissed the petition.

This proceeding is brought to reverse the judgment of the court of appeals.

Mr. Murray Seasongood, for plaintiff in error.

Mr. Louis H. Capelle and Mr. S. C. Roettinger, for defendants in error.

85 By the Court: Is the membership in the New York Stock Exchange property? If so, is the situs of the property at the domicile of the owner? If these questions are answered in the affirmative, Do the statutes of Ohio provide for its taxation?

The record shows that the membership is a valuable right. The privileges of a member are not only valuable in their use, but the membership has a market value. Plaintiff paid more than $60,000 for his seat. The stock exchange owns the entire capital stock of the Exchange Building Company, which owns the real estate in which the business is conducted. Facilities are furnished for the conduct of brokerage business by members of the exchange.

The right of a member is to trade at the exchange in New York, and not elsewhere, in securities listed on the exchange. Admissions to membership are made on the vote of the committee on admissions. Membership may be transferred on the approval of the transfer by the committee. On the death of a member his seat is sold and the net proceeds of the sale after payment of claims of members are paid to his estate.

When one has become a member of the New York Stock Exchange he has a contractual right to have the association conducted in accordance with its rules and regulations.

All of these things are essential incidents of property. The restrictions which the mutual agreements of the membership place upon the use and the ownership may possibly decrease its
86 market value. On the other hand these very restrictions may increase its value. They do not affect its status as property any more than restrictions on the lots in a subdivision of real estate.

In Rogers v. Hennepin County, 240 U. S., 184, it is held that memberships in exchanges, such as involved in this case, are property, notwithstanding restrictions upon their use, and nothing in the Federal Constitution prevents their being taxed; that whether such memberships are taxable under state statutes is a matter of local law; that the memberships are distinct from the assets of the corporation, and taxing members on their membership and the corporation on its assets does not amount to double taxation.

In the case we have here the membership is personal property, and the fact that the assets of the association consist in very large part of the capital stock of the realty corporation in New York City, and that the privilege is to do business in the building there, does not give the membership the quality or character of real property.

The shares of stock in a realty company are personalty. The things that the company owns, whether real or personal, do not affect the character of the shares of stock in the company.

Where is the situs of the property or membership owned by the member?

It is well settled that a state has no power to tax personal property
permanently situated in another state. Southern Pacific Co.
87 v. Kentucky, 222 U. S., 63, 74.

As we have seen, the rights of a member are contractual. There are mutual covenants and agreements between the exchange and the members as well as the obligations assumed by the members toward each other. These contractual rights are enforceable, like other contract rights. They are choses in action.

A state has power to tax intangible property, choses in action, at the domicile of the owner, and such domicile is the situs of that class of personal property. 1 Cooley on Taxation (3 ed.), 89; Southern Pac. Co. v. Kentucky, supra, 63, 76, and Union Refrigerator Transit Co. v. Kentucky, 199 U. S., 194.

In the recent case of Fidelity & Columbia Trust Co. v. Louisville, 245 U. S., 54, it was held that liability to taxation in one state does not necessarily exclude liability in another.

Now, in this case the right secured to a member to go to the stock exchange in New York and there conduct his business in stocks in the manner prescribed is doubtless the most valuable right of membership. But as incident to his membership he is also granted the right to deal with and through other members on certain fixed percentages and methods of division of commissions. This right to secure the services of other members at a lower rate and to split commissions is a very valuable right. By it the plaintiff in Cincinnati is enabled to properly hold himself out to the world as a member
entitled to all the privileges and able to secure all of the ad-
88 vantages of the New York Stock Exchange. All of which advantages are denied to nonmembers. He is thus enabled to conduct from and in his Cincinnati office a large business through other members in New York. All of which is regularly and properly done.

The situs of the valuable contractual property right of plaintiff is at the domicile of plaintiff in Cincinnati, and the state of Ohio has the right to tax it here.

In deciding that shares of stock constitute property, different from the capital or property of the company, Judge Spear, in Lee, Treas., v. Sturges, 46 Ohio St., 153, says at page 161: "The capital or property of the company may be largely real estate, while the shares are, in their nature, personalty. They can have no locality, and must, therefore, of necessity, follow the person of the owner, unless other provision is made by statute. The corporation is the legal owner of all the property of the company, real and personal, and within the powers conferred upon it by its charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. * * * The shares of stock may be worth much more than the property of the corporation; that is, the franchise may be very valuable while the visible capital may be of but little value."

The Constitution, Section 2, Article XII, enjoins the legislature to enact laws taxing by a uniform rule all property at its true
89 value in money, with right to exempt certain property. It is well determined that this section is a limitation on the general power to tax conferred by the first section of Article II of the Constitution, and unless tax laws have been enacted which include the property here in question it is not taxed.

It is of course conceded that taxing statutes are to be construed strictly in favor of the citizen and against the taxing authority.

Section 5328, General Code, reads as follows: "All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

Section 5325, General Code, contains the following: "The term 'personal property' as so used, includes first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of a parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stocks."

In Lee v. Sturges, supra, it is said at page 159: "For every
90 presumption is in favor of that construction of the law which gives effect to the requirement of the section of the constitution referred to, and we are forced to the conclusion that the general assembly, in enacting this law, intended, so far as the complex nature of human business affairs should make it practicable, to include within the taxing provisions all property within the state, and not to exceed in its exemptions the limit prescribed, as to persons, of personal property not exceeding in value two hundred dollars for each individual.' And, further, that where an exception or exemption is claimed, the intention of the general assembly to except must be expressed in clear and unambiguous terms. 'The exemption must be shown indubitable to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is

only where the terms of the concessions are too explicit to admit fairly of any other construction that the proposition can be supported.' Railway Co. v. Supervisors, 93 U. S., 595; Tucker v. Ferguson, 22 Wall., 527. Intent to confer immunity from taxation must be clear beyond a reasonable doubt, for, as in case of a claim of grant, nothing can be taken against the state by presumption or inference."

The provisions of Sections 5328, General Code, are comprehensive and provide for the taxation of all real or personal property, and that includes the property here in question.

Section 5325, General Code, does not exclude any property
91 or thing from the term personal property, but out of abundant caution provides that the term shall include the things named. It cannot be construed as if it read the term shall only include.

As pointed out in Ohio Electric Ry. Co. v. Village of Ottawa, 87 Ohio St., 229, 236, the maxim expressio unius exclusio alterius is to be applied only as an aid to discover intention, and not to defeat clear intention.

In view of the plain provision of the constitution enjoining the taxation of all property real and personal, and of the equally plain provision of Section 5328, General Code, passed in obedience to the constitutional injunction, there can be no doubt that when it is once determined that the membership in question is personal property and that its situs is the domicile of the plaintiff in Hamilton county it is taxable there.

Judgment affirmed.

Jones, Matthias, Johnson, Wanamaker and Robinson, JJ., concur. Donahue, J., not participating.

92 STATE OF OHIO,
*City of Columbus:*

Supreme Court of the State of Ohio, of the Term of January, A. D. 1920.

I, J. L. W. Henney, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing transcript, consisting of fourteen (14) pages, constitutes a full, true and correct copy of the original opinion of the Supreme Court of Ohio in the case of Anderson vs. Durr, Auditor, et al., as the same appears on file and of record in this office, as of the date of this certificate.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this twelfth day of January, A. D., 1920.

[Seal The Supreme Court of the State of Ohio.]

J. L. W. HENNEY,
*Reporter*

93 *Certificate of Lodgment.*

SUPREME COURT, STATE OF OHIO, *ss:*

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk, on January 8th, 1920, in the case John M. Anderson, plaintiff in error, vs. Peter W. Durr, former Auditor, et al., defendants in error—

1. The original bond, a copy of which is herein set forth.

2. Two copies of the writ of error as herein set forth, one for the defendants in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 13th day of January, A. D. 1920.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
*Clerk of the Supreme Court of Ohio.*

94 Supreme Court of Ohio.

No. 16234.

JOHN M. ANDERSON, Plaintiff in Error,

vs.

PETER W. DURR, as Former Auditor; E. S. BEAMAN, as Auditor, and CHARLES C. COOPER, as Treasurer of Hamilton County, Ohio, Defendants in Error.

*Petition for Writ of Error.*

To the Hon. Hugh L. Nichols, Chief Justice of the Supreme Court of Ohio:

Your petitioner, John M. Anderson, respectfully shows that on July 8, 1919, the Supreme Court of the State of Ohio, rendered a final judgment against your petitioner in the above entitled action, wherein your petitioner, John M. Anderson, was plaintiff in error and petitioner and Peter W. Durr, as former Auditor, E. S. Beaman, as Auditor and Charles C. Cooper, as Treasurer of Hamilton County, Ohio, were defendants in error and respondents; that in said judgment, in this, the highest court of the State of Ohio, and the said leading up to the rendering thereof, there were and are drawn in question the validity of a statute of and an authority exercised under the United States and the decision was against their validity and there was also drawn in question the validity of certain statutes of and authority exercised under the State of Ohio, on the ground of their being repugnant to the Constitution and laws of the United

States and the decision was and is in favor of their validity, as more particularly appear from the assignment of errors filed herewith; that on July 30, 1919, and within the time and in the manner fixed by the rules of this Court, there was filed an application for rehearing and that, on or about, December 23, 1919, said application for rehearing was denied, whereby said Federal rights under the
95 Constitution and laws of the United States were again drawn in question and decided adversely to your petitioner, as is also shown in greater detail by the assignment of errors filed herewith and your petitioner desires to review in the Supreme Court of the United States all said several questions by virtue of Section 237 of the Judicial Code.

Your petitioner further shows that the Federal questions made and decided in said cause were necessarily decided adversely to the contentions of your petitioner in the decision and judgments of this Court.

Wherefore, this petitioner prays that a writ of error may issue in this behalf for the correction of the errors conceived by petitioner to have been committed to his prejudice and which are complained of and that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States; that a citation be granted and signed; that the bond presented herewith be approved and that the alleged errors and complaint be reviewed in the Supreme Court of the United States and the judgment of said Supreme Court of Ohio be reversed.

MURRAY SEASONGOOD,
*Attorney for John M. Anderson.*

96 [Stamped:] Filed Jan. 8, 1920. Supreme Court of Ohio. Frank E. McKean, Clerk.

97 Supreme Court of Ohio.

No. 16234.

JOHN M. ANDERSON, Plaintiff in Error,

vs.

PETER W. DURR, as Former Auditor; E. S. BEAMAN, as Auditor, and CHARLES C. COOPER, as Treasurer of Hamilton County, Ohio, Defendants in Error.

*Order Allowing Writ of Error.*

The above entitled cause coming on to be heard upon the petition of John M. Anderson, plaintiff in error and petitioner, for a writ of error from the Supreme Court of the United States to the Supreme Court of Ohio and upon examination of the said petition and the record in said case and desiring to give the petitioner an opportunity

to present to the Supreme Court of the United States the questions presented in said case, it is

Ordered, that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States and that the bond presented by said petitioner be, and the same hereby is approved this 8th day of January, 1920.

HUGH L. NICHOLS,
*Chief Justice of the Supreme Court of Ohio.*

Jan. 8, 1920.

98 [Stamped:] Filed Jan. 8, 1920. Supreme Court of Ohio, Frank E. McKean, Clerk.

99 Supreme Court of Ohio.

No. 16234.

JOHN M. ANDERSON, Plaintiff in Error,

vs.

PETER W. DURR, as Former Auditor; E. S. BEAMAN, as Auditor, and CHARLES C. COOPER, as Treasurer of Hamilton County, Ohio, Defendant- in Error.

*Assignment of Errors.*

John M. Anderson, in connection with his petition for a writ of error, makes the following assignment of errors, which he says appear in the record and proceedings herein, as follows:

I. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals for the First District of Ohio, dismissing the petition and holding plaintiff in error's membership in the New York Stock Exchange to be taxable under the statutes of Ohio.

II. The Supreme Court of Ohio erred in denying the application for rehearing, thus, in effect, holding plaintiff in error's privilege of membership in the New York Stock Exchange to be taxable, in violation of the Constitution of the United States.

III. The said Court erred and its judgment is contrary to this plaintiff in error's rights under Article XIV, Section 1 thereof, in addition to and amendment of the Constitution of the United States, since the essence of membership in the New York Stock Exchange is a privilege of doing business on certain real estate in New York and not elsewhere and for Ohio to attempt to tax same constitutes attempted taxation of property permanently outside the State of Ohio and a taking of this plaintiff in error's property without due process of law.

IV. The said Court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United
100 States in violation of Article IV, Section 2, and Article XIV, Section 1 thereof, in addition to and amendment of the Constitution of the United States, in depriving this plaintiff in error of the equal protection of the laws, other property of a somewhat analogous character, admittedly located and having its situs in Ohio, not being taxed.

V. The said Court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article IV, Section 2 thereof, and Article XIV, Section 1 thereof, in addition to and amendment of the Constitution of the United States, in depriving this plaintiff in error of the equal protection of the laws and the privileges and immunities of citizens in the several states, in that plaintiff in error is singled out for unfair discrimination and required to pay:

1. The Ohio Blue Sky tax;

2. A so-called property tax, but really a license tax of one and one-half percent on the whole value of his right to carry on substantially the same brokerage business on the New York Stock Exchange; and

3. The Cincinnati occupational tax on the same privilege, nine-tenths of plaintiff in error's whole brokerage business being business conducted on said New York Stock Exchange.

VI. The said Court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article I, Section 8 thereof, authorizing the Congress to regulate Commerce in the several States, and the statutes of the United States passed in pursuance thereof, regulating such Commerce, in that permitting defendant in error to tax plaintiff in error's business done on the New York Stock Exchange originated in Ohio is a tax on Interstate Commerce, and an illegal interference with same.

VII. The said Court erred and its judgment is contrary
101 to this plaintiff in error's rights under the Constitution of the United States in violation of Article IV, Section 2 thereof and Article XIV, Section 1 thereof, in addition to and amendment of the Constitution of the United States in that by the decision and judgment of said Court this plaintiff in error is deprived of property without due process of law by the State of Ohio and is denied the equal protection of the laws.

VIII. The said Court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article IV, Section 2 thereof, and Article XIV, Section 1 thereof, in addition to and amendment of the Constitution of the United States, in that Sections 5328 and 5325 of the General Code of Ohio are interpreted thereby so as to tax a privilege incident

to real estate located in New York and said sections so interpreted are unconstitutional, so far as regards this plaintiff in error's rights under the Constitution of the United States.

IX. The said Court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article IV, Section 2 thereof, and Article XIV, Section 1 thereof, in that Section 5322 of the General Code of Ohio, describing real property as including not only land itself, but all rights and privileges belonging or appertaining thereto is made thereby an unconstitutional enactment, in that plaintiff in error's rights and privileges belonging or appertaining to land in New York in connection with his membership in the New York Stock Exchange, are not, by the judgment of the Court, included in said Section 5322 and so not taxed.

Wherefore, the plaintiff in error, John M. Anderson, prays that the judgment and decision aforesaid may be reversed and annulled and that he may be restored to all things which he has lost by reason thereof.

MURRAY SEASONGOOD,
*Attorney for Plaintiff in Error.*

102 [Stamped:] Filed Jan. 8, 1920. Supreme Court of Ohio, Frank E. McKean, Clerk.

103 Supreme Court of Ohio.

No. 16234.

JOHN M. ANDERSON, Plaintiff in Error,

vs.

PETER W. DURR, as Former Auditor; E. S. BEAMAN, as Auditor, and CHARLES C. COOPER, as Treasurer of Hamilton County, Ohio, Defendants in Error.

*Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Judicial Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Ohio, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John M. Anderson and Peter W. Durr, former Auditor, E. S. Beaman, as Auditor and Charles C. Cooper, Treasurer of Hamilton County, Ohio, wherein was drawn in ques-

tion the validity of a statute of or an authority exercised under the United States and the decision was against their validity; and wherein was drawn in question the validity of statutes of and an authority exercised under the State of Ohio, on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of their validity, and manifest error hath happened to the great damage of the said John M. Anderson, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
104 United States, together with this writ, so that you have the same at Washington, on the 7th day of February, next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, this 8 day of January, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

[Seal United States District Court, Southern Dis. Ohio.]

B. E. DILLEY,
*Clerk of the District Court of the United States for the Southern District of Ohio.*

Allowed by
HUGH L. NICHOLS,
*Chief Justice of the Supreme Court of Ohio.*

105 [Stamped:] Filed Jan. 8, 1920. Supreme Court of Ohio, Frank E. McKean, Clerk.

106 Supreme Court of Ohio.

No. 16234.

JOHN M. ANDERSON, Plaintiff in Error.

vs.

PETER W. DURR, as Former Auditor, et al., Defendants in Error.

*Precipe.*

To the Clerk:

Please make complete transcript of docket and journal entries and complete record of proceedings in the Supreme Court of Ohio

certify same and send same with original papers to the Clerk of the Supreme Court of the United States.

MURRAY SEASONGOOD,
*Attorney for Plaintiff in Error.*

Received notice of filing of above praecipe and receipt of copy of same is acknowledged. Defendants in error desire to make no additions thereto.

LOUIS H. CAPELLE,
*Prosecuting Attorney;*
S. C. ROELLINGER,
*Assistant Prosecuting Attorney,*
*Attorneys for Defendants in Error.*

107 [Stamped:] Filed Jan. 12, 1920. Supreme Court of Ohio, Frank E. McKean, Clerk.

108 Supreme Court of Ohio.

No. 16234.

JOHN M. ANDERSON, Plaintiff in Error,

vs.

PETER W. DURR, as Former Auditor; E. S. BEAMAN, as Auditor, and CHARLES C. COOPER, as Treasurer of Hamilton County, Ohio, Defendants in Error.

*Citation.*

UNITED STATES OF AMERICA, *ss:*

To Peter W. Durr, as former auditor; E. S. Beaman, as auditor, and Charles C. Cooper, as treasurer of Hamilton County, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of Ohio, wherein John M. Anderson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of said Supreme Court, this 8 day of January, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fourth.

HUGH L. NICHOLS,
*Chief Justice of the Supreme Court of Ohio.*

The issue and service of the within citation are waived and appearance is entered by the defendants in error.

LOUIS H. CAPELLE,
*Prosecuting Attorney;*
S. C. ROELLINGER,
*Assistant Prosecuting Attorney,*
*Attorneys for Defendants in Error.*

109 [Stamped:] Filed Jan. 12, 1920. Supreme Court of Ohio. Frank E. McKean, Clerk.

110 Supreme Court of Ohio.

No. 16234.

JOHN M. ANDERSON, Plaintiff in Error,

vs.

PETER W. DURR, as Former Auditor; E. S. BEAMAN, as Auditor, and CHARLES C. COOPER, as Treasurer of Hamilton County, Ohio, Defendants in Error.

*Copy of Bond on Writ of Error.*

Know all men by these presents, that we, John M. Anderson, as principal and Royal Indemnity Company, a corporation, as surety, are held and firmly bound unto Peter W. Durr, as former Auditor, E. S. Beaman, as Auditor and Charles C. Cooper, as Treasurer of Hamilton County, Ohio, in the sum of Five Hundred ($500.00) Dollars, to be paid to the said Peter W. Durr, as former Auditor, E. S. Beaman, as Auditor and Charles C. Cooper, as Treasurer of Hamilton County, Ohio, for the payment of which well and truly to be made we bind ourselves and each of us, our heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents.

Signed, sealed and dated this 8th day of January, 1920. Whereas, lately at a regular term of the Supreme Court of the State of Ohio, in a suit depending in said Court between said John M. Anderson, plaintiff in error and petitioner and Peter W. Durr, as former Auditor, E. S. Beaman, as Auditor and Charles C. Cooper, as Treasurer of Hamilton County, Ohio, defendants in error and respondents, a judgment was rendered against the said John M. Anderson and the said John M. Anderson having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Peter W. Durr, as former Auditor, E. S. Beaman, as Auditor and Charles C. Cooper, as Treasurer of Hamilton County, Ohio, citing and admonishing them to be and appear at the session of the Su-

111 preme Court of the United States, to be holden at the City of Washington, D. C., thirty (30) days thereafter, now, the

condition of the above obligation is such, that if the said John M. Anderson shall prosecute said writ of error to effect and answer all costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN M. ANDERSON,
By MURRAY SEASONGOOD,
*Attorney.*

Attest:
C. A. DILG,
MAY BERGER.

ROYAL INDEMNITY COMPANY,
By JOHN A. DITMARS,
*Attorney in Fact.*

Approved January 8th, 1920.

HUGH L. NICHOLS,
*Chief Justice of the Supreme Court of the State of Ohio.*

112 [Stamped:] Filed Jan. 8, 1920. Supreme Court of Ohio, Frank E. McKean, Clerk.

113 *Authentication of Record.*

STATE OF OHIO,
*City of Columbus, ss:*

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, order allowing writ of error, assignment of errors, writ of error, precipe, and citation are the original papers filed in this Court in the above entitled cause; that the copies of the motion to certify record, supplemental petition in error, application for rehearing and bond herein set forth are true copies of the originals of said pleadings filed in said cause; that the printed copy of the record attached hereto is a true copy of the printed record filed in said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said Court and that a certified copy of the opinion, is attached hereto.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 13th day of January, A. D. 1920.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
*Clerk Supreme Court of Ohio.*

114 UNITED STATES OF AMERICA,
*Supreme Court of Ohio, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, in the City of Columbus, this 13th day of January, A. D. 1920.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
*Clerk Supreme Court of Ohio.*

Endorsed on cover: File No. 27,432. Ohio Supreme Court Term No. 677. John M. Anderson, plaintiff in error, vs. Peter W. Durr, as former auditor; E. S. Beaman, as auditor, and Charles C. Cooper, as treasurer of Hamilton County, Ohio. Filed January 19th, 1920. File No. 27,432.

# SUPREME COURT OF THE UNITED STATES,
## OCTOBER TERM, 1920.

No. [redacted]27

John M. Anderson, Plaintiff in Error,

vs.

Peter W. Durr, as Former Auditor, E. S. Beaman, as Auditor, and Charles C. Cooper, as Treasurer, of Hamilton County, Ohio.

## BRIEF FOR PLAINTIFF IN ERROR.

Murray Seasongood,
Counsel for Plaintiff in Error.

The Rueblat Printing Company, 1013-1020 Elm Street, Cincinnati, O.

## INDEX.



### Table of Cases, Statutes and Authorities.

## Statutes and Constitution.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1920.

---

**No. 225.**

---

John M. Anderson, Plaintiff in Error,

vs.

Peter W. Durr, as Former Auditor, E. S. Beaman, as Auditor, and Charles C. Cooper, as Treasurer, of Hamilton County, Ohio.

---

# BRIEF FOR PLAINTIFF IN ERROR.

---

## Statement.

This cause comes to this Court by writ of error to a judgment of the Supreme Court of Ohio, denying an application for rehearing (R. 73) of a judgment of the Supreme Court of Ohio, the highest court of the state, adjudging (R. 73) plaintiff in error's membership in the New York Stock Exchange to be taxable at its full market value in Ohio, where plaintiff in error resides.

The facts are stated in the petition for writ of certiorari to this court, the consideration of which was postponed, with the consent of the Court and counsel, to the time of hearing the case on the writ of error.

As the printed record in the Supreme Court of Ohio is used here, the record references in the petition for writ of certiorari will be applicable here, as supplemented by the additional proceedings printed under the supervision of the clerk of this Court.

The application for rehearing to the Supreme Court of Ohio (R. 64) again showed that court, the plaintiff in error had, from the commencement of the litigation, asserted and persisted in asserting, rights under the Constitution of the United States (R. 68-70).

The assignments of error are as follows (R. 83-5):

**Assignment of Errors.**

I. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals for the First District of Ohio, dismissing the petition and holding plaintiff in error's membership in the New York Stock Exchange to be taxable under the statutes of Ohio.

II. The Supreme Court of Ohio erred in denying the application for rehearing, thus, in effect, holding plaintiff in error's privilege of membership in the New York Stock Exchange to be taxable, in violation of the Constitution of the United States.

III. The said court erred and its judgment is contrary to this plaintiff in error's rights under Article XIV., Section 1 thereof, in addition to and amendment of the Constitution of the United States, since the essence of membership in the New York Stock Exchange is a privilege of doing business on certain real

estate in New York and not elsewhere and for Ohio to attempt to tax same constitutes attempted taxation of property permanently outside the State of Ohio and a taking of this plaintiff in error's property without due process of law.

IV. The said court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article IV., Section 2, and Article XIV., Section 1 thereof, in addition to and amendment of the Constitution of the United States, in depriving this plaintiff in error of the equal protection of the laws, other property of a somewhat analogous character, admittedly located and having its situs in Ohio, not being taxed.

V. The said court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article IV., Section 2 thereof, and Article XIV., Section 1 thereof, in addition to and amendment of the Constitution of the United States, in depriving this plaintiff in error of the equal protection of the laws and the privileges and immunities of citizens in the several states, in that plaintiff in error is singled out for unfair discrimination and required to pay:

1. The Ohio Blue Sky tax.

2. A so-called property tax, but really a license tax of one and one-half percent on the whole value of his right to carry on substantially the same brokerage business on the New York Stock Exchange; and

3. The Cincinnati occupational tax on the same privilege, nine-tenths of plaintiff in error's whole brokerage business being business conducted on said New York Stock Exchange.

VI. The said court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article I, Section 8 thereof, authorizing the Congress to regulate Commerce in the several states, and the statutes of the United States passed in pursuance thereof, regulating such Commerce, in that permitting defendant in error to tax plaintiff in error's business done on the New York Stock Exchange originated in Ohio, is a tax on Interstate Commerce, and an illegal interference with same.

VII. The said court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article IV., Section 2 thereof, and Article XIV., Section 1 thereof, in addition to and amendment of the Constitution of the United States in that by the decision and judgment of said court this plaintiff in error is deprived of property without due process of law by the state of Ohio and is denied the equal protection of the laws.

VIII. The said court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article IV., Section 2 thereof, and Article XIV., Section 1

thereof, in addition to and amendment of the Constitution of the United States, in that Sections 5328 and 5325 of the General Code of Ohio are interpreted thereby so as to tax a privilege incident to real estate located in New York and said sections so interpreted are unconstitutional, so far as regards this plaintiff in error's rights under the Constitution of the United States.

IX. The said court erred and its judgment is contrary to this plaintiff in error's rights under the Constitution of the United States in violation of Article IV., Section 2 thereof, and Article XIV., Section 1 thereof, in that Section 5322 of the General Code of Ohio, describing real property as including not only land itself, but all rights and privileges belonging or appertaining thereto is made thereby an unconstitutional enactment, in that plaintiff in error's rights and privileges belonging or appertaining to land in New York in connection with his membership in the New York Stock Exchange, are not, by the judgment of the court, included in said Section 5322 and so not taxed.

The statutes of Ohio to be considered are printed as an appendix.

## Argument.

### I.

**Membership in the New York Stock Exchange is a unique species of property, being a personal privilege inseparably connected with and exercisable only upon certain real estate located in New York City. The situs**

**for taxation of such membership is permanently in New York and outside the state of Ohio.**

A voluntary association like this has no technical name or place in the law. (1 Dos Passos on Stock Brokers and Stock Exchanges (Second Ed.) p. 20). Each member does his own business (id. p. 21) and is not interested in the business done by any other member. The exchange, as such, does no business; there are no profits or losses to be divided. Although the exchange owns property, the ownership is a mere incident and not the main object of the association. The member has no severable property interest in it, nor a right to any proportionate part on withdrawing (id. 29). Substantially, the whole property of the association is the exchange real estate, consisting of its land and the building in New York City (R. 38). The title to this land and building is in a New York corporation, of which the entire capital stock is beneficially owned by the exchange (R. 38). This method of holding the real estate is adopted in order to avoid difficulty of conveying the land (1 Dos Passos, p. 35).

A seat or membership is a species of incorporeal property, a personal, individual right, to exercise a certain calling in a certain place, but without the attributes of descendibility or assignability characteristic of other species of property (1 Dos Passos, p. 146). It cannot be attached or seized on execution, being, in substance, a mere license to buy and sell (id. p. 147).

A privilege inseparably connected with real estate

should be regarded, in taxation statutes, as in the nature of real estate. Sec. 5322, of the Ohio Code prescribes that "real property," in the taxation statutes, shall include not only land itself,

> ". . . but also, unless otherwise specified . . . all rights and privileges belonging, or appertaining thereto."

Certainly a membership in the New York Stock Exhange is a right and privilege belonging or appertaining to the floor of the exchange building located in New York. It is exactly analogous to the ferry franchise considered in Louisville & Jeffersonville Ferry Company vs. Kentucky, 188 U. S. 385. In speaking of membership in the Boston Stock Exchange, Judge Morton, in a dissenting opinion, in Currier vs. Studley, 159 Mass. 17, 24, said:

> "It lacked some of the ordinary incidents of property. It could be used only by the defendant, and was not originally descendible nor assignable. A way in gross can be used only by the owner, and is not descendible, nor assignable, but is nevertheless property."

In 2 Bouvier's Law Dictionary (Rawle's Revision, 1897), 14 ed. 657, a way is defined as a privilege to go over another's ground and as an incorporeal hereditament of a real nature; and a way in gross (p. 1222), as purely personal, incommunicable to another.

In 1 Bouvier's Law Dictionary, Fourteenth Edition, p. 696, an incorporeal hereditament is defined as:

> "A right issuing out of a thing corporate (whether real or personal), or concerning or annexed to or exercisable within the same."

In Plumber vs. Bowie, 76 Me. 496, 498, it is shown, rent may come from two kinds of realty; that is, from corporeal or incorporeal property, and that there are many incorporeal properties which may yield a rent; as, for example, the use of a way, of a pew, of playgrounds, pasturage, agistment of cattle, boomage, wharfage, buoyage and moorage, as illustrations.

In 2 Cooley's Blackstone, 35, it is shown private ways are not inheritable, being special permission given to the grantee alone; the grant is particular.

In 3 Kent's Commentaries (Fourteenth Edition) *460, page 727, corporations are said to be the most usual franchises known in our law. Strictly, they are not hereditaments, as they are not inheritable, since corporations never die. They are nevertheless deemed incorporeal hereditaments. In this connection, the author cites Price vs. Price, 6 Dana (Kentucky), 107 (1838), representative of the law as then settled, where shares in a railroad corporation in Kentucky were adjudged real estate, which descend as realty and in which the widow might be endowed. This case maintains the right conferred on each shareholder in such corporation is unquestionably an incorporeal hereditament, because it is a right of perpetual duration and the fact it springs out of the use of personalty as well as lands and houses does not matter,

for it is a franchise, which has always been classed in that class of real estate denominated, "incorporeal hereditament." An annuity, though only chargeable upon the person of the grantor, is an incorporeal hereditament; and though the owner's security is merely personal, yet he may have real estate in it (2 Blackstone's Commentaries, 40).

While the above case cited by Kent is not the law in Ohio, and we have a statute in Ohio (Sec. 8682), as follows:

> "Sec. 8682. Shares of stock in a corporation shall be personal property, and when fully paid up, be subject to levy and sale upon execution against the owner."

Still, the case is of interest, with those above referred to, as showing the difficulty of classifying rights which are incident to real estate under the usual group of incorporeal hereditaments. Whether a personal right to go on certain real estate at certain hours only and transact there, either in person or by others having the same right, business in a limited class of securities, subject to rules prescribed by the governing body of the owners of the real estate, is technically an easement, a franchise, a private right of way or way in gross, the substantial rights, by whatever name called, are inseparably connected with real estate, just as much as was the ferry right in the Jeffersonville Ferry case. Crops growing in the ground are personal property, 2 Bouvier, 327, and leases for years are things personal or chattels real, 2 Bouvier, 327, yet they certainly relate to real

estate. So of an estate pur autre vie, 2 Bouvier, 394. Fixtures, title deeds, family portraits, money, slaves and other heirlooms are personal property, but were treated sometimes as realty, 2 Bouvier, 14 ed. 414. The method of conveyance does not determine the essence of the thing. Immovables and moveables were the divisions in the civil law of what we call real and personal property, 2 Bouvier, 14 ed. 413. Methods of conveyance of real estate have completely changed since feudal times. Interests in real estate may be acquired, under certain circumstances, without any conveyance at all; nevertheless, they amount to ownership of real estate or of rights therein, quite as much as if they had been obtained with all the formalities of livery of seisin or of grant.

In Rogers vs. Hennepin County, 240 U. S. 184, the seventh paragraph of the syllabus is:

> "Memberships in an Exchange represent rights and privileges to be exercised at the Exchange where located, and it is competent for a state to fix the situs of memberships of both residents and non-residents for the purpose of taxation at the place where the Exchange is located, and in so doing it does not deprive non-resident members of their property without due process of law."

Subsequently, the question arose, where the memberships should be taxable. In State, ex rel., Goetzman vs. Minnesota Tax Commission, 136 Minn. 260, s. c. 161 N. W. 516, the court said, amplifying the second paragraph of the syllabus (p. 262):

> "One of the relators is a resident of Minne-

> apolis, another is a resident of the state, and the other is a non-resident of the state. A question is made as to the proper place of taxation. The character of the rights and privileges which attend memberships is sufficiently stated in State vs. McPhail, 124 Minn. 398 . . . . and in the earlier cases of," citing them. **"Such rights and privileges gave whatever value there is in the memberships in excess of the tangible property of the chamber. They are exercisable only at Minneapolis. For the purpose of taxation of such excess value, the memberships, though owned without the state, or within the state, but without Minneapolis, have a situs there"** (bold type mine).

This case is conclusive, therefore, that what gives a membership value is the right, exercisable where the exchange is located and that that, therefore, fixes there the situs for taxation. It will be noticed, there were three classes of members; those residing in Minneapolis, those in Minnesota outside of Minneapolis, and those non-resident. The question of situs was, therefore, fully raised and clearly decided. If the membership had a situs outside of Minneapolis, the court would have said so, with respect to those members, at least, living in Minnesota outside of Minneapolis.

In Thompson vs. Adams, 93 Pa. State, 55, 66, the membership in an exchange was held not to be property that can be seized on execution. In Pancoast vs. Gowen, 93 Pa. State, 66, it is said:

> "A seat in the Board of Brokers is not prop-

> erty subject to execution in any form. It is a mere personal privilege, perhaps more accurately, a license to buy and sell at the meetings of the Board. It certainly could not be levied on and sold under a fi. fa."

This case is cited with approval in Page vs. Edmunds, 187 U. S. 596, 604.

In Barclay vs. Smith, 107 Ill. 349, a membership in the Board of Trade was held to be not subject to sale on execution. In Lowenberg vs. Greenebaum, et al., 99 Cal. 162, a "seat" in a stock exchange is described as nothing more than an incorporeal right, which is not attachable, and is not subject to sale under execution. The only way to subject it to the satisfaction of a judgment is by proceedings supplementary to execution, requiring delivery to a receiver.

In London and Canada Loan, etc., vs. Morphy, 10 Ont. Rep. (Q. B. D.), 86, a seat in the Toronto Stock Exchange was held not subject to seizure under the writ of sequestration.

In Ketcham vs. Provost, 141 N. Y. Supp. 437, at 441, it is said:

> ". . . nor is a stock exchange seat such a collateral as may be sold by the pledgee. The way in which it could be accomplished would be to report the failure of the member to meet his obligations to the Stock Exchange, whereupon he might be suspended for a year and such further time as the governing board in its discretion might give. The seat cannot be sold by individuals. It is not transferable like a stock or bond; membership in the exchange is the

right to participate as a member in a voluntary private organization.

". . . it would only be when the Stock Exchange itself acted and disposed of the seat that the proceeds thereof would become available."

In Weston vs. Ives, 97 N. Y. 222:

"From admissions in the pleadings it appeared, the New York Exchange was a voluntary association organized for the purpose of conducting and regulating the business of dealing in stocks in the City of New York; . . . ."

The assignee of a member who had failed could not prevail, as to the proceeds of the sale of the seat, over exchange creditors, since the constitution was held binding as to debts to be recognized.

In People, ex rel Lemmon vs. Feitner, 167 N. Y. 1, a membership in the New York Stock Exchange was decided not to be "personal property" within the general tax law of New York. It was not denied that such a membership was property, but it was property of so exceptional a character, the court held it not to be included within any of the enumerations of property of the taxing statute.

Mayor and City Council of Baltimore, et al., vs. Bartlett S. Johnson, 96 Maryland, 767, holds a seat in the Baltimore Stock Exchange is not property within the meaning of that term, as used in Article 15 of the Bill of Rights and in the revenue laws of the state, and is, therefore, not liable to assessment and taxation.

In San Francisco vs. Anderson, 103 Cal. 69 (1894),

the only question was whether or not a "Seat" in the San Francisco Stock Exchange Board is taxable property and the court said not, adding:

> "What such a 'seat' is, sufficiently appears in the opinion of this court in Lowenberg vs. Greenebaum, 99 Cal. 162; 37 Am. St. Rep. 42. In that case we held that a seat in said board being merely 'a personal privilege of being and remaining a member of a voluntary association with the assent of the associates,' was not property that would pass by a sale under a common writ of execution; and following the views there expressed we hold that it has no such qualities as make it assessable and taxable as property. It is a mere right to belong to a certain association with the latter's consent, and to enjoy certain personal privileges and advantages which flow from membership of such association. These privileges and advantages cannot be transferred without the consent of the association and a forced sale of them would not give to the purchaser the right to occupy said 'seat.' It is too impalpable to go into any category of taxable property."

In Caldicott vs. Griffiths and Lowe, 8 Exchequer, 898, 903, Pollock, C. B., in deciding members of the Midland Counties Guardian Society for the Protection of Trade, were not partners, likened them to a number of persons subscribing to a hospital or ordinary club.

In Belton vs. Hatch, 109 N. Y. 593, 596-8, in holding an expelled member has no interest in the proceeds of the sale of his seat, the court likened membership in

the exchange to membership in a club and decided the rules of the association were an incident to the rights acquired by the person upon admission.

In White vs. Brownell, 4 Abbotts Practice, New Series, 162, at page 190:

> "It is analogous to what, in other branches of commerce, has long been familiarly known by the word "Change"—a fixed place where merchants meet, at certain hours, for the transaction of business with each other; subject to such general rules or understanding as they think proper to be governed by. There may be property belonging to this body, derived from the payment of dues or fines, or consisting of the furniture of the room where the board meets; but the possession of it is a mere incident, and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportionate part of it upon withdrawing. He has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the body while it continues to exist, like a pew, the ultimate and dominant property in which is in the congregation and not in the pew-holder; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets (St. James Club, 13 Eng. L. & Eq. 592; Fassett vs. First Parish in Boyleston, 19 Pick. 361). This board of stock brokers is in fact analogous to the organization which came under consideration in Caldicott vs. Griffith (8 Exch. 898), called Mid-

land Counties Guardian Society for the Protection of Trade, which was decided not to be a partnership. So far, therefore, as the plaintiff claims the equitable interference of this court upon the assumption that this association is a co-partnership, or upon the ground that the rules which regulate the action of courts of equity in cases of partnership, are to be applied to it, the claim can not be supported."

(In some states pews are regarded as real estate; in others, as personalty and in still others their precise nature is not well settled, 2 Bouvier, 14 ed. 329, 414).

The same case in the lower court (3 Abbots Practice, n. s., p. 324), after calling attention to the fact that the members of the New York Stock Exchange are simply brokers or agents, each transacting no business for himself, but as the middleman or negotiator for other persons for a compensation, goes on:

"It follows from the very nature of such an organization, with such objects, intents and purposes, that there must be rules and regulations for the good order of the association, and such rules should be held to be conclusive as to the mode of transacting business between the members, and as to the privilege of admission to, and continued enjoyment of, membership.

"As this association is not organized in pursuance of any statute, nor are the terms of membership fixed by principles of the common law, it follows that the agreement which the members make among themselves on the subject must establish and determine the rights of the

parties on the subject. The constitution of the association, and its laws agreed upon by the members, contain all the stipulations of the parties and form the law which should govern. The members have established a law for themselves."

In re Hurlbutt Hatch & Company, 135 Fed. 504, C. C. A. (2), the bankruptcy court, required a bankrupt member of the New York Stock Exchange to request the committee on admissions to sell his seat and pay the proceeds to the trustee, after deducting moneys due others, according to the rules of the exchange. This case cites (pp. 506-7) many decisions of this court, recognizing this species of property

". . . is peculiar, and in its nature a personal privilege, . . . ."

A later case holding such membership passes to the trustee in bankruptcy, in reliance on the decisions of this court is, In re Stringer, 253 Fed. 352, 354, C. C. A. (2).

These cases are not inconsistent with the cases before referred to, in many states, holding such a membership is not subject to seizure on execution. All recognize that the rules of the exchange are binding and the proceeds of membership can be realized on only subject to the conditions imposed in the constitution of the exchange. The cases recognize that a membership in the exchange is unquestionably property, but they also recognize that it is a unique species of property, which cannot be realized on in the way that

ordinary real or personal property is subjected to seizure: all rights must be worked out through the New York Stock Exchange and subject to its constitution and conditions. These cases all tend to show that the situs of the property is where the exchange is located and not elsewhere, just as in Standard Gas Power Company of Georgia vs. Same of Delaware, 224 Fed. 990, 991, interpreting that section of the Judiciary Act relating to removal of cloud upon:

> ". . . the title to real or personal property within the district . . ."

there is quoted the language of Judge Lacombe, as follows:

> "I can not satisfy myself that the section covers (or was intended to cover) such incorporeal and intangible property as a patent right, possession of which must of necessity be ideal, not actual, and which cannot be seized or sold under an execution."

The Judge, quoting this language, added (p. 992):

> ". . . a patent right is not such 'real or personal property,' as would come within this language or within this act. A patent right is something granted by the Patent Office in Washington to an inventor, which 'right' he may sell, transfer or assign, and over which he has, until he divests himself of such 'right,' exclusive control; but it is not such real or personal property, in my opinion, as was contemplated by this act, such property as the court can seize and act upon as was intended by this law."

In Murphy vs. Ford Motor Company, 241 Fed. 134, the right of a trustee in bankruptcy to an admitted debt, was held not to be "personal property," the court saying:

> "What he has may be personal property, as distinguished from real property, but the property he has is the right—if the right is established—to get the money upon the assertion of his right in a competent forum."

No extended argument is necessary to show how different is a membership in the New York Stock Exchange from any of the ordinary classes of property taxed at the domicile of the owner. The privilege is for the member to do an individual brokerage business in the State of New York.

While this privilege is not granted by the State of New York, as is the franchise of a New York corporation, the right conferred by the Committee on Admissions is to do business in New York, just as much as if the right had been conferred by the State of New York. It is immaterial whether the member does this business in person, or through others on a basis more favorable than such others would do the business for non-members: the business, in either case, is transacted on the floor of the Exchange in New York City. If no business is done, no income is earned. Nor has plaintiff in error any muniment of title in Ohio, or elsewhere (R. 38).

In the case of stocks, the owner has power at his domicile to effect a sale or pledge, to will them specifically,

to receive, at his domicile, earnings of the corporation, and he has a proportionate share of the corporate assets. He has a stock certificate, which is a negotiable document of title, personal property, in many states, subject to seizure by execution.

In the case of bonds, the owner has a right to a definite income, at his domicile, without the necessity of effort on his part to produce such income. Even if the bond is not kept in the state of his domicile, it is readily removable thereto, at any time; whereupon a complete enjoyment of it there will be in the owner. In the case of money or bank accounts, the same is true: the owner is in complete control and can tranfer the account from one state to another by signing his name to a check.

But, in the case at bar, plaintiff, to acquire his membership, paid $60,000 in 1911 (R. 53). As there are eleven hundred members and less than $6,000,000 of assets, it is obvious, the plaintiff did not pay $60,000 to get an interest in these assets, since his proportionate share would be less than $5,500.00 and since the Exchange has not made and does not make any distribution of assets to members (R. 41).

The distinction made by this Court in Cream of Wheat Company vs. Grand Forks, 253 U. S. 325, as to property which the state of domicile may, or may not tax, is between property having a permanent situs outside the state domicile, which may not be taxed, and property not having such situs, which may be

taxed. Real property has, of course, a permanent situs where located and it is contended by us that a privilege inseparably connected with real property is in the nature of real property for taxation purposes. Not all personal property located outside the state of domicile may not be taxed there, but only such as has a permanent situs and that situs outside the taxing state. So, if this membership is to be classed as intangible personal property, it is not intangible property which may be taxed at the state of domicile, as other intangible property may be, because this intangible right has a permanent situs in New York State.

If tangible personal property may or may not be taxed in the state of domicile, depending on whether it has acquired a permanent situs outside the state of domicile, so intangible personal property should likewise be taxable or not, depending on whether it has acquired a permanent situs outside the state. Ordinarily, intangible property cannot acquire a permanent situs outside the state where the owner resides and yet if it is a privilege inseparably connected with real estate, it is an incorporeal or intangible right, having a situs where the real estate is located. The constitution forbids Ohio to tax its citizens on New York real estate, or on tangible personal property permanently located in New York (although ownership of such real estate or personal property may be of material benefit to the owner in Ohio), not because such property happens to be real estate or tangible

property, but because, in both cases, the property, whatever it is, is permanently located outside the taxing state.

So, whether this membership, as matter of nomenclature, should technically be classed as real estate, because, in essence a right inseparably appended to real estate, or whether it should be called intangible personal property, does not determine the question of its taxability, its permanent situs being, by whatever name called, in New York.

Some of the cases referred to in the Cream of Wheat case, are carefully examined in Commonwealth vs. West India Oil Refining Company, 138 Ky., 838, but all the cases referred to in the Cream of Wheat case where a tax on intangible or tangible property was sustained, are instances of such property having no fixed, permanent situs outside the taxing state. In the Cream of Wheat case, the corporation was a North Dakota corporation, which maintained (p. 327) a public office in the City of Grand Forks in said State for the transaction of its usual and corporate business. All of its business might have been transacted at such office, but the corporation chose not to transact any business there. It was conceded, also (p. 328, top), North Dakota might propertly have imposed a franchise tax upon this corporation, even though it had no property within the state. The difference between a franchise tax measured by property and a property tax, while recognized in the decisions of this Court, is,

nevertheless, a narrow one. Flint vs. Stone-Tracy Co., 220 U. S., 107. In the case at bar, however, Mr. Anderson could not maintain in Ohio an office for the transaction of New York Stock Exchange business: the business must be transacted on the floor of the Exchange. Mr. Anderson could solicit orders in Ohio, but the execution of these orders was necessarily in New York. The Supreme Court of Ohio, in its opinion (R. 78), said:

> "Now, in this case the right secured to a member to go to the stock exchange in New York and there conduct his business in stocks in the manner prescribed is doubtless the most valuable right of membership. But as incident to his membership he is also granted the right to deal with and through other members on certain fixed percentages and methods of division of commissions. This right to secure the services of other members at a lower rate and to split commissions is a very valuable right. By it the plaintiff in Cincinnati is enabled to properly hold himself out to the world as a member entitled to all the privileges and able to secure all of the advantages of the New York Stock Exchange. All of which advantages are denied to non-members. He is thus enabled to conduct from and in his Cincinnati office a large business through other members in New York. All of which is regularly and properly done."

As shown in the petition for rehearing (R. 66), however, if the Court concedes that the most valuable right of membership is to do business on the floor of the Ex-

change, why may a mere incident be seized on to tax the most valuable right of membership? The plaintiff is taxed because of a mere incident, on the whole value of his membership, the substantial value of which, as the Court concedes, is doing business in another state, which may not be taxed. This is a mere "quibble" (Selliger vs. Ky., 213 U. S., 200, 206), analogous to taxing a corporation doing both intrastate and interstate business on its intrastate business, so that taxation of the interstate business done will also be included. The decisions of this Court have forbidden that. International Paper Co. vs. Massachusetts, 246 U. S. 135.

So have they interdicted a tax on the whole value of the capital stock of a company, part of which is represented by tangible property permanently outside the taxing state. Del. etc. Co. vs. Pa. 198 U. S. 341. In the Ferry case, the State contended the Indiana franchise was not taxed, because the tax purported to be on the capital stock (pp. 386, 393, 394, bot.-5), but Justice Harlan went through the fiction to the fact, that as the tax was on the whole capital stock, it necessarily included the franchise.

But, the Ohio Supreme Court is in error in assuming that the "incident" of division of commissions is business done in Ohio. Commissions are earned by business transacted in New York. In the case of a member, he divides the fixed commission earned for transacting business in New York with the member in New York transacting the business. In the case of a non-

member in Cincinnati buying and selling stocks on the Exchange in New York, such non-member may not divide the commission earned by his correspondent in transacting the business forwarded by the Cincinnati member, but he can have the business transacted, nevertheless, and earn a commission.

So, it is frequently the case that Cincinnati brokers, not members of the New York Stock Exchange, will advertise:

> "Private Wire Service, connecting our office with New York and othern Eastern Cities for the prompt execution of orders upon New York Stock Exchange."
>
> Or:
>
> "Mr. is correspondent of & Co., members of the New York Stock Exchange. He has splendid direct wire service to New York and is in a position to give almost immediate execution of orders."

Neither Mr. Anderson, nor the Cincinnati broker who is not a member of the New York Stock Exchange, executes transactions in Ohio. That is impossible. Both send on orders they obtain in Cincinnati, to be executed by a member of the Exchange on the floor of the Exchange, in New York. The orders cannot be executed except on the floor of the Exchange. To this extent, they are in exactly the same position. Mr. Anderson receives from his New York correspondent a percentage of the fixed commission allowed by the Exchange, earned by his correspondent for executing orders there. The Cincinnati broker, not a member

of the Exchange, may not share in the commission earned by his New York correspondent, member of the Exchange, who executes the Cincinnati order sent on there, but he charges his client a commission for sending on the order and having the same executed in New York.

The non-member is not taxed on his correspondent's membership in the New York Stock Exchange, although it is such membership which enables the non-member Cincinnati broker to execute his customers' orders. The Cincinnati non-member may charge as much as Mr. Anderson does, as a commission to his client and probably charges more, since he may not divide the commission earned by his correspondent. Without a seat in the New York Stock Exchange, he realizes as much as Mr. Anderson, or more, if he can command the business of sending on orders to New York for execution. Mr. Anderson is taxed, according to the Supreme Court of Ohio, because he gets a portion of the commission earned by his correspondent from business transacted in New York. Why should there be a difference, depending on whether the broker is partially compensated by his correspondent for orders transmitted there, or is compensated entirely by his client for sending on orders to New York?

An Ohio citizen may own real estate in New York and enjoy increased credit from general knowledge of his ownership of it. He may derive rents in Ohio from such real estate, but, if such rents were taxable, surely

that would not permit taxation by Ohio of the real estate. Whatever fraction of commission Mr. Anderson earns from orders forwarded to New York for execution is taxed as money or credits in Ohio: the fact he earns such fractions does not justify taxing his membership in the New York Stock Exchange, any more than it would justify taxing real estate he might own in New York or justify taxing a non-member broker on the membership in the New York Stock Exchange of the broker who executes his orders.

II.

**Plaintiff in error, subjected to unreasonable, discriminatory and multiple taxation, is deprived of the equal protection of the laws.**

In the supplemental petition in error (R. 63), in the Supreme Court of Ohio, it was shown, after this suit was instituted, the city of Cincinnati passed an occupational tax, which was sustained by the Supreme Court of Ohio (R. 69-70). Although the Occupational Tax Ordinance was passed and its validity was sustained after the suit was brought, the Supreme Court, having been informed thereof by the supplemental petition (R. 73-4), considered the bearing of the occupational tax in connection with the application for a rehearing.

The compliance by plaintiff in error with the Ohio "Blue Sky Law" and payment of the license fee or tax required to be paid thereunder is conceded in the stipu-

lation as to facts (R. 40-1), and so is the fact that memberships in local stock exchanges and other similar voluntary business associations and the privileges of practicing professions and memberships in professional associations are not taxed by the state of Ohio (R. 41). Other Cincinnati brokers, not members themselves of the New York Stock Exchange, earning commissions on orders transmitted by them to New York for execution by members of the New York Stock Exchange, are not taxed the fair market value of this privilege, but pay only the City Occupational Tax and State Blue Sky Tax.

Although the syllabus in State ex rel. vs. Carrel, Auditor, 99 O. S., 220, the case upholding the constitutionality of the Cincinnati Occupational Tax Ordinance had appeared before the case at bar was decided by the Supreme Court of Ohio in July, 1919, the full opinion of the court was not available (R. 69), for some months thereafter. This opinion amplifies the proposition of the syllabus, that because the state had not levied an occupational tax, the city might do so. Yet, in the case at bar, the court held that the state, by Sections 5328 and 5325, had, in effect, levied a tax on the full value of the privilege arising from membership in the New York Stock Exchange.

Where a broker pays the Ohio Blue Sky License Tax and also pays the Cincinnati Occupational Tax, which latter is sustained only because the Supreme Court says there is no State Occupational Tax and

yet sustains a tax by the state on the same occupation, other brokers paying the Cincinnati Occupational Tax and complying with the Blue Sky Law, not being taxed on the value of their membership in the Cincinnati Stock Exchange, nor on the privilege of doing the identical business in New York Stock Exchange securities done by plaintiff in error, surely this is an arbitrary and unreasonable subjecting of plaintiff in error to unjust discrimination and multiple, confiscatory taxation in violation of his constitutional rights, quite as much as the discrimination reprobated in Royster Guano Company vs. Virginia, 253 U. S. 412. See, also, Travis vs. Yale & Towne Mfg. Co., 252 U. S. 60; and Goldsmith vs. Construction Co., 252 U. S. 12, 17.

This incorporeal right is sufficiently located in New York for New York to subject it to its inheritance tax (Estate of Hellman, 174 New York, 254, 257), and to its general property tax, should the law be amended so as specifically to include such membership. Rogers vs. Hennepin County, 240 U. S. 184. To how many kinds of tax on the same privilege is an Ohio broker to be subjected, not exacted of other brokers doing the same business, before he will be considered entitled to protection under the Constitution of the United States.

III.

**The tax sought to be levied is a direct burden on Interstate Commerce.**

As before shown, plaintiff in error transacts no business in Ohio by virtue of his membership in the New York Stock Exchange. Securities listed on that

exchange must be bought and sold there and not elsewhere, under penalty of expulsion for non-compliance with the rule requiring this (R.34). Plaintiff in error, if not in New York so as to buy and sell on the floor of the exchange in person for his clients, transmits by wire to New York, orders or securities received in Cincinnati and receives from New York remittance of his share of the commission earned there and, when desired by the client, the certificates of stock bought or proceeds of sales made in New York.

The Ohio tax is said to be a property tax. Applied, however, to the privilege here in question, it is a tax levied on the privilege, and the privilege, if any business is done in Ohio, is to do only Interstate Commerce. Union Tank Line Company vs. Wright, Comptroller General of Georgia, 249 U. S. 275.

## IV.

**The decision of the Supreme Court of Ohio denies plaintiff in error due process of law and the equal protection of the laws.**

The decision amounts to so gross a mistake as not to be possible, if well recognized rules of decision and precedents had been followed (Chicago Life Insurance Company vs. Cherry, 244 U. S. 25, 30). Again, the settled course of construction of the Ohio Taxing Statutes had become a rule of property conferring, for the years preceding, immunity from taxation on this privilege, within the spirit of Gelpcke vs. Dubuque,

1 Wall. 175; Louisiana vs. Pilsbury, 105 U. S. 278; Muhlker vs. New York, etc, Railroad Company, 197 U. S. 544; and Milwaukee Electric, etc., Co. vs. Wisconsin, 252 U. S. 100, 106.

The decision was rendered by a bare majority of the court (R. 65, 80), if one of the judges who was not present at the argument (R. 65) were not included. The Chief Justice did not concur (R. 80), which we understand to be equivalent to dissent.

We have already referred to Section 5322, defining real property for purposes of taxation as including, unless otherwise specified,

> ". . . all rights and privileges belonging or appertaining thereto."

In Chisholm vs. Shields, 67 O. S. 374, the very statute interpreted by the Supreme Court had been interpreted as follows:

> "So that the word 'otherwise,' Sec. 2731" (now Sec. 5328 G. C.), "includes only such property or investments as are specifically mentioned and required to be taxed in the subsequent sections, and property or investments not so mentioned can not be taxed. And in so specifically mentioning and requiring to be taxed the property must be such as is ordinarily included in the description given, and not such as can be brought within the description by a process of reasoning only, or by a strained construction. The general assembly must be presumed to be able to fairly describe such property as it desires to tax without resorting to a

strained construction, or a course of fine reasoning."

No other state had ever interpreted "personal property" as including membership in an exchange located in another state (R. 40).

The court totally disregarded the force of practical construction for a generation, by the taxing officials in Ohio. It totally disregarded the settled rule of construction that taxing statutes are to be construed strictly against the Sovereign.

It disregarded the fact that the legal counsel for the taxing officials had admitted, in writing to the court, after full trial in the trial court that such memberships are not included in the taxing laws of Ohio (R. 10, 65).

This court will scan the Ohio taxation statutes printed in the appendix in vain, if it is sought to find that this privilege, "belonging or appertaining to real estate" (Sec. 5322), is by any other statute taken out of the class of "real property."

The court appears not to have noticed the constitutional objections to interpreting the taxing laws of Ohio so as to include this privilege of doing business in another state, although these objections were called to the attention of the court in every way possible.

## Conclusion.

A right inseparably connected with real estate in another state, whether coming within one of the recognized classes of incorporeal hereditaments or not, may

not be taxed in a state other than that in which the land to which the right is appendant, lies. It is urged, therefore, that the judgment of the Supreme Court of Ohio, holding plaintiff in error's right to go on the floor of the New York Stock Exchange and transact business there, is property taxable in Ohio, be reversed.

Respectfully submitted,

Murray Seasongood,

Counsel for Plaintiff in Error.

## APPENDIX.

Section 5322. The terms "real property" and "land" as so used, include not only land itself, whether laid out in town lots or otherwise, with all things contained therein but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto (R. S., Sec. 2730).

Section 5323. The term "investment in bonds" as so used, includes all moneys in bonds, certificates of indebtedness, or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others (R. S., Sec. 2730).

Section 5324. The term "investment in stocks" as so used, includes all moneys invested in the capital or stock of a bank whether incorporated under the laws of this state or the United States, or an association, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing within this state, either for themselves or others (R. S., Sec. 2730).

Section 5325. The term "Personal property" as so used, includes first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of a parcel of real property, as hereinbefore defined; second, the

capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stocks, profits, or means, by whatsoever name designated, inclusive of every share or portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel or boat is within the jurisdiction of this state or elsewhere, and whether it has been enrolled, registered, or licensed at a collector's office, or within a collection district in this state, or not; third, money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for it, if between the parties thereto it is considered as security merely (R. S., Sec. 2730).

Section 5327. The term "credits" as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of the state, other than such as are held to be money, as hereinbefore defined, when added together, estimating every such claim or demand at its true value in money, over and above the sum of legal bona fide debts owing by such person. In making up the sum of such debts owing, there shall not be taken into account an obligation to a mutual insurance company, nor an unpaid subscription to the capital stock of a joint stock company, nor a subscription for a religious, scientific, literary, or charitable purpose; nor an acknowledgment of indebtedness,

unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor an acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor a greater amount or portion of a liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound, and will be compelled to pay, or to contribute, in case there are no securities. Pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits, a greater portion of any credits than he believes will be received or can be collected, or a greater portion of an obligation given to secure the payment of rent than the amount that has accrued on any lease and remains unpaid (R. S., Sec. 2730).

Section 5328. All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title (R. S., Sec. 2731).

Section 5368. The listing of all personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be made between the second Monday of April and the third Monday of May, annually. The assessor, on or before the first Monday of May, annually, shall leave with each person, resident in his township or ward, of full age, and

not an insane person, or at the office, usual place of residence or business of each person, a written or printed notice, requiring such person to make out for the assessor a statement for the property, which, by law, he is required to list, accompanied with printed forms, in blank, for such statement. The assessor, at the time he delivers such notice and blank forms, shall demand and receive such statement, unless such person requires further time to make it out, in which case he shall call for it before the third Monday of May (R. S., Sec. 2747).

Section 5369. A person or party so listing property, or other items named in the statement described in the next preceding section, shall take and subscribe an oath or affirmation according to law, to be administered by the assessor, to the effect, adapting the form to the capacity in which the person making the return acts, that the statement contains, as he verily believes, a true account of all the taxable personal property, moneys, credits and investments in bonds, stocks, joint stock companies, annuities or otherwise, owned or controled by such person for his own use, or as parent, guardian, trustee, executor, administrator receiver, accounting officer, factor, agent, or otherwise, and also of all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, held for him, or any one residing in this state, for whom he is required by law to list by any person residing in or out of this state, and not listed for taxation in pursuance of law in this state by such holder, and every interest and right, legal or equitable, of the person listing and of those for whom he is required by law to list in bonds, stocks, joint stock companies, or otherwise, which he is required by law to list for taxation, and that the value fixed to each of said items is the value thereof

as ascertained by the usual selling price thereof for cash, at voluntary sales thereof, at the time and place of listing; and if there is no usual selling price, then at such price as could be obtained therefor in money, at such time and place, and that he has not made an acknowledgment or agreement, or contracted a debt, without receiving an adequate consideration therefor or resorted to any device, or created a trust, or sold or exchanged or disposed of money, property, or effects, which were taxable in this state, for United States bonds or other non-taxable securities or moneys, for the purpose of evading taxation, or diminishing the amount of his return for taxation, and that all interest that he has or owns in any credit or evidence of indebtedness, secured in any manner, upon real estate or personal property, situated outside of the county in which he resides or in taxable stocks or bonds, or in stocks or bonds of a foreign corporation, has been duly listed by him for taxation (R. S., Sec. 2749).

Section 5376. Such statement shall truly and distinctly set forth: first, the number of horses, and the value thereof; second, the number of meat cattle, and the value thereof; third, the number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages, of every kind, and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eight, the number of watches, and the value thereof; ninth, the number of pianos and organs, and the value thereof; tenth, the average value of the goods and merchandise, which such person is required to list as a merchant; eleventh, the value of the prop-

erty which such person is required to list as a banker, broker, or stock-jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or by deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled them, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April (R. S., Sec. 2737).

Note—Secs. 5368, 5369 and 5376 have been amended by 107 O. L. 29 since this action was begun.

Title Municipal Corporations.

Sec. 4677. In the interpretation of this title, unless the context shows that another sense was intended, the word "village" shall mean incorporated village, the word "Municipality" shall mean a municipal corporation; "person" includes a private corporation; "writing" includes print; "oath" includes affirmation; "insane" and "lunatic" include every species of mental derangement; "property" includes real, personal, and mixed estates and interests; and "land" and "real estate" include rights and easements of an incorporeal nature; but this enumeration shall not be construed to require a strict construction of any other words in this title (R. S., Sec. 1536).

# Supreme Court of the United States

**OCTOBER TERM, 1920**

**No. 225.**

*JOHN M. ANDERSON,*

*Plaintiff in Error,*

vs.

*PETER W. DURR, as former Auditor,*
*E. S. BEAMAN, as Auditor,*
*C. C. COOPER, as Treasurer of*
*Hamilton County, Ohio,*

*Defendants in Error.*

## Brief of Defendants In Error.

### STATEMENT OF CAUSE.

This cause comes into this Court by writ of error to the judgment of the Supreme Court of Ohio denying an application for a re-hearing of this cause in said court after judgment against plaintiff in error (plaintiff below), and upon the petition for writ of certiorari to this court, the consideration of which was postponed to the time of hearing the cause on the writ of error.

### STATEMENT OF FACTS.

Anderson, the plaintiff in error, brought suit against the defendants in error to enjoin the listing for taxation and the collection of taxes on the plaintiff's mem-

bership in the New York Stock Exchange for certain years. The petition alleged that the plaintiff in error, (plaintiff below) had been a member of that exchange for five years last past; that it is an unincorporated association of persons whose object it is to furnish exchange rooms and other facilities in New York City for the convenient transaction of its business by its members as brokers; to maintain the high standards of commercial honor and integrity among its members; to promote and inculcate just and equitable principles of trade and business; that in substance the privilege conferred by membership is to trade at the exchange in New York City and not elsewhere, in certain securities listed on the exchange; that the government of the exchange is vested in a governing committee of officers and of forty members; that no person can be admitted to membership unless elected by the entire vote of two-thirds of the fifteen members comprising the committee on admission; that a person elected to membership must pay an initiation fee and must sign the constitution and pledge himself to abide by the same; that the dues of members are $50.00, semi-annually, exclusive of fines and assessments for a gratuity fund, which is a plan to provide for families of deceased members; that a transfer of membership may be made upon the submission of the name of the candidate to the committee on admissions, with the approval of the transfer by two-thirds of the entire committee, subject to certain conditions; there is no general or other right to transfer or pledge membership in the exchange and no right or privilege in connection therewith which may be exercised in the State of Ohio; that any mem-

ber may be suspended from membership or made ineligible for re-admission or may be expelled from membership by a vote of two-thirds of the existing members of the governing committee for certain stated causes. Dealing upon any other exchange in the City of New York or publicly outside of the exchange, either directly or indirectly, in securities listed or quoted in the Exchange is forbidden; no member has any certificate or share of membership or interest in the assets, and the plaintiff has not in Ohio or elsewhere any such certificate or share which can be sold, transferred, assigned or incumbered or used; the only evidence of plaintiff's membership is a letter to him from the Secretary notifying him of his election; that the exchange owns no assets in Ohio and all property of any kind belonging to it is wholly and permanently in New York; that the plaintiff is a co-partner with Walter B. Powell, under the firm name of Anderson and Powell, formed for the purpose of dealing in investment securities, with an office in Cincinnati and plaintiff and his co-partner, as aforesaid, have paid and will pay, when due, all taxes properly assessed against them; that the defendants will, unless enjoined, list the plaintiff's membership or franchise in said Exchange for taxation; that the New York Stock Exchange has been in existence for almost a hundred years and membership therein has been declared not to be property within the general property tax laws of New York, and no attempt has been made as far as plaintiff knows to tax it in Ohio or elsewhere; that the levying of taxes on the plaintiff's privilege, if regarded as property, is an attempt to levy and collect taxes on property wholly outside of the state of Ohio,

amounts to taking property without due process of law in violaion of the Constitution of the State of Ohio and of the United States.

The answer of the defendants in error (defendants below), admit the membership of the plaintiff in the New York Stock Exchange and his residence in Hamilton County, Ohio; that the Exchange is an unincorporated association of persons whose object is as stated in the petition, and that the membership therein is secured as stated in the petition and dues and assessments for the gratuity fund are paid as therein stated.

Defendants further admit that a transfer of membership may be made upon submission of the name of the candidate to the committee on admissions and approved as the averments of the petition set forth; that the Secretary keeps the ledger referred to with the names of all the members of the Exchange and the only evidence of the plaintiff's membership is to be found on the books of the Exchange and in the letter from the Secretary as stated.

Defendants admit that the plaintiff is a co-partner with Walter B. Powell under the firm name of Anderson & Powell and that the partnership was formed for the purpose of, and said partners are now engaged in, the dealing in investment securities listed on the New York Stock Exchange, with an office in the city of Cincinnati, and that the defendant Durr, intends to list said membership for taxation in Hamilton County, Ohio, and defendants deny each and every other allegation in the petition.

Further answering the defendants say that for many years the plaintiff has been engaged in the business of

broker and dealer in stocks etc. and has a large business and clinetele for the purchase and sale of stocks, bonds and securities listed and dealt in on the New York Stock Exchange and that plaintiff has held himself out and represented to said clinetele and the public at large as furnishing proper, convenient and ample facilities for the transaction of all kinds of investment business and the purchase of all kinds of stocks and bonds; that prior to April, 1911, plaintiff purchased a seat on the New York Stock Exchange, believing and intending that he would obtain additional facilities for the transaction of his business, increase his ability to serve his clients and by virtue of the ownership of such seat on the New York Stock Exchange would increase and extend such business; that the ownership of such seat on the New York Stock Exchange has in fact materially increased said facilities and ability to serve the plaintiff's clients and has served to increase his business, establish his position in the business world and increase the profits arising from said business; that the defendants are informed and so allege the fact to be that plaintiff paid for said seat in addition to an initiation fee of two thousand dollars and annual dues the sum of $60,000, which was the recognized market value of such seats and that such sum was so paid that plaintiff might secure the business advantages arising from such membership on the Exchange; that in addition to the ordinary business advantage connected with membership there is an insurance feature known as the Gratuity fund Plan, whereby approximately ten thousand dollars is contributed to the family of any member who dies in good standing. There is a further

security for the fulfilment of contracts made with stock exchange members in that the value of the membership of each member is first liable to the settlement of contracts made with other members thus insuring to the extent of the value of such membership the financial responsibility of the members in their mutual dealings; that subject to the acceptability of the transferee by the members of the membership committee, all memberships are transferable by the voluntary act or transfer or by will and that in case of transfer by a member voluntarily, by death or by the governing committee, the net proceeds are turned over and go to the member of his estate; that such membership has a well recognized market value which is ascertainable from current quotations; subject to the condition that each applicant must be at least twenty-one years of age, a citizen of the United States and pay an initiation fee of two thousand dollars and be acceptable to two-thirds of the entire membership committee, such seats are transferable for a consideration at the will of the member.

Defendants further aver that in the transaction of the business of brokers in stocks and bonds a differentiation is made between members and non-members in that business is transacted by members on account of other members at a commission of not less than 1/32 of 1% while a commission of not less than 1/8 of 1% is charged to non-members; firms of co-partnerships in which one member owns a seat are entitled to have business transacted at rates prescribed for members; that by reason of the transferability and market value of said seat and the manifest business advantages arising from such membership and the additional faci-

lities for the convenient and more profitable transaction of the business of the members, the ownership of such seat constitutes personal property with the definition of the General Code, Section 5325, and an investment within the provisions of Section 5328 and 5372, General Code.

For reply plaintiff denies that memberships are transferable by will and says that such memberships are a personal privilege or license to buy and sell in meetings of the Exchange in New York City and not elsewhere; that such membership is not subject to execution and cannot be pledged or used as collateral and the same cannot be willed, and denies that it is personal property within the definition of the Sections of the General Code referred to.

On the trial of the cause in the Court of Common Pleas of Hamilton County, Ohio, that Court entered a decree and judgment for plaintiff in error (plaintiff below). On appeal, the Court of Appeals for the first district of Ohio rendered judgment in favor of defendant in error, defendant below, and dismissed the petition. On error, the Supreme Court of Ohio affirmed the judgment of the Court of Appeals for the first district of Ohio. This proceeding is brought to reverse the judgments of the Court of Appeals for the first district of Ohio and the Supreme Court of Ohio and to affirm the judgment of the Court of Common Pleas of Hamilton County, Ohio.

## ARGUMENT.

In our view of this case there are two questions to be determined and the determination of these questions decide the entire case.

First: **IS A SEAT ON A STOCK EXCHANGE PROPERTY WHICH IS TAXABLE IN OHIO WHEN THE OWNER OF THE SAME IS A RESIDENT AND DOMICILED IN SAID STATE?**

Second: **IS THE TAXATION OF SUCH PROPERTY BY THE STATE IN WHICH THE OWNER IS DOMICILED IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES OR STATE OF OHIO?**

The Supreme Court of Ohio have decided in this case (copy of opinion of the Supreme Court of Ohio and of the Court of Appeals for the first District of Ohio hereto appended) that the taxing statutes of Ohio included this class of property, towit: a seat on the New York Stock Exchange. The construction of these taxing statutes being a matter of local law and having been considered by a court of last resort of the State, this Court will not review the construction of these statutes but will only consider whether or not under the construction made by the Supreme Court of Ohio any Federal right of the plaintiff in error has been violated.

The record shows that the membership in the New York Stock Exchange owned by plaintiff in error (plaintiff below) is a right and valuable right. It further

shows that said Anderson paid for said seat or membership the sum of $60,000.00 (R. 5.).

It is agreed and admitted that the plaintiff in error is not taxed upon said membership in the State of New York.

As to whether or not a membership in a stock exchange is taxable, we believe that the case of Rogers vs. Hennepin County (240 U. S. 4) is the leading and determining case upon the subject. This is a case involving a membership in the Chamber of Commerce of the City of Minneapolis, Minn. Paragraph 3 of the syllabus recites:

> "3. Memberships in exchanges such as this involved in this action are property notwithstanding restrictions upon their use and nothing in the Federal Constitution prevents their being taxed."
>
> "4. Whether memberships in exchanges are in fact taxable under the state statutes is a matter of local law."
>
> "5. Memberships in an incorporated exchange are property of the respective members and are distinct from the assets of the corporation, and taxing the members on their membership and the corporation on its assets does not amount to double taxation."
>
> "8. The statute has broad discretion as to tax exemption and the taxation of memberships in associations conducting exchanges in which business transactions are conducted for profit, does not deny equal protection of the laws because memberships in other associations not conducting business exchanges and where there are manifest distinctions not also taxed; classification is a reasonable basis."

The court in its opinion says:

"It is not to be doubted * * * * that the memberships despite the restrictions of the rules were property."

See also Hyde vs. Woods, 94 U. S. 523
Sparhawk vs. Yerkes, 142 U. S. 1-12
Page vs. Edmonds, 187 U. S. 596-604

The court further says at page 190:

"The membership as property was distinct from the assets of the corporation."

(See Van Allen vs. Assessors, 3 Wall 573
Farrington vs. Tenn., 95 U. S. 679
Davidson vs. New Orleans, 96 U. S. 97)

Continuing the court says, quoting with approval the language of the Supreme Court of the State of Minnesota, in State vs. McPhail (124 Minn, 398):

"We do not sustain the claims that the taxation of memberships in a board of trade or stock exchange would violate the provisions of the Federal or State constitutions."

In the above case (that of State vs. McPhail, supra) the Supreme Court of Minnesota states:

"A membership has a use value and a buying and selling or market value. It is bought and sold. There is a lien upon it for balances due members. It passes by will or descent and by insolvency or bankruptcy. It is true there are certain restrictions in the ownership and use of a membership. This may increase or decrease its value, probably in the case of a board of trade membership, greatly enhance it. They do not prevent its being property."

All of the above quoted language of the Supreme Court of Minnesota was quoted with approval by the

Supreme Court of the United States in the Rogers case. In the case of Sparhawk vs. Yerkes, 142 U. S. 1, the Supreme Court had before it memberships held by Yerkes in both the New York Stock Exchange and the Philadelphia Stock Exchange, and the same general rule as to its being a property right was laid down. In the case of Hyde vs. Woods, 94 U. S. 523, the Supreme Court says at page 524:

> "There can be no doubt but that the incorporial right which Yerkes had of this seat when he became bankrupt was property and the sum realized by the assignees from its sale proves that it was valuable property."

In Page vs. Edmond, 187 U. S. 596, we find (paragraph 1 syl.):

> "A seat or membership in the Philadelphia Stock Exchange belonging to a person adjudicated a bankrupt is property which the bankrupt could have disposed of within the meaning of subdivision 5 Section 70 of the Bankruptcy Act of 1898. It therefore passes to the trustee in bankruptcy of the owner."

Continuing in its opinion the court says:

> "The appellant could have sold his membership, the purchaser taking it subject to election and some other conditions. It had value * * * *. It was property and substantial property * * * * * *."

In this case the court cites with approval the cases of Hyde vs. Woods and Sparhawk vs. Yerkes, Supra. We find all thru the record in this case that certain valuable rights accrued to those who are members of the exchange and are absolutely denied to all others. Membership confers the right to deal and trade in

stocks and securities in accordance with the rules and regulations of the exchange (which is in New York City) and not elsewhere, and at certain times of the day, in securities listed on the exchange and subject, of course, to all conditions imposed by the governing body of the exchange. In addition to this there is a life insurance feature which goes with each membership and which is for the benefit of the families of the members upon the decease of the member. It is true that members do not receive a formal stock certificate but they do receive a letter of notification (R 38) which is just as much a certificate of membership as might be the most elaborately engraved stock certificate.

We contend that the right to use the rooms and quarters of the exchange is merely for the convenience of the members and is an incidental right, very much as would be a membership in any social club. It is inconceivable that any person would pay the sum of $60,000.00 merely for the right to use certain rooms and then in addition pay the annual dues required by the rules. It is a right to do business thru the exchange and thereby be in a position greatly to increase his own business that is the valuable right of such membership. As to the fact that a seat on a stock exchange is property in addition to the cases already cited see:

Platt vs. Jones, 96 N. Y. 24
In re Currie, 185 Fed. 731
Powell vs. Waldron, 89, N. Y. 328
Bank vs. Abbott, 181 Mass. 531
Odell vs. Boiden, 150 Fed. 731.

If it were true that such membership is not property how could it be taxable under the Inheritance Tax Laws

of the State of New York? That it is so taxed see In re Hellman, 174 N. Y. 245.

We have examined with great care the case cited with so much emphasis in the brief of plaintiff in error, viz. Louisville Ferry Company vs. Kentucky, 188 U. S. 385, and we cannot find therein any rule comparing a membership in a ferry franchise with a membership in a stock exchange. Neither can we find merit in the contention of counsel for plaintiff in error that membership in the New York Stock Exchange is in fact interest in real estate situate in the City of New York. The record shows (R 38) that the land, and building situated thereon, in the City of New York where the stock exchange is located is not the property of the New York Stock Exchange but is in a separate corporation duly incorporated under the laws of the State of New York, it being true that the entire capital stock of the corporation is beneficially owned by the New York Stock Exchange. (R 39) This corporation is known as the New York Stock Exchange Building Co. It cannot be contended with merit that the member himself—plaintiff in error—controls in any way this New York real estate. It could be disposed of by the corporation without any individual act on the part of this plaintiff in error. For the distinguishing rule between a membership in a ferry company and the ownership of a stock certificate see Hawley vs. Malden, 232, U. S. 1 at page 12 of which case the Supreme Court is found to say:

> "While the shareholders' rights are those of a member of a corporation entitled to have the cor-

porate enterprise in accordance with its charter they are still in the nature of contract rights."

Choses in Action.
Morawets on Corporations, Sec. 225.

As such, in the absence of legislation prescribing a different rule, they are properly related to the person of the owner and being held by him at his domicile constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. See also in support of above,

Kirtland vs. Hotchkiss, 100 U. S. 491
Bonaparte vs. Tax Court, 104 U. S. 592
Covington vs. First Nat'l. Bank, 198 U. S. 100
Southern Pacific Co. vs. Kentucky, 222 U. S. 63
Cooley on Taxation, 3rd Ed. 26.

In further support of the doctrine that the citus of Choses in Action follows the domicile of the owner see:

Union Transit Co. vs. Kentucky, 199 U. S. 194
Cooley on Taxation, 89-93-650-651
15 Wallace, 300.

The point as to whether or not stock or shares such as that under consideration is personal property, no matter where the corporation is or may be situate is very definitely settled by the famous and oft quoted case of Lee, Treasurer vs. Sturges, 46 O. S. 153 with which is consolidated Insurance Co. vs. Ratterman. A part of paragraph 1 of the sylabus reads as follows:

"The provision * * * * that 'no person shall be required to include in his statement as a part of the personal property money, credits, investments in bonds, stocks, joint stock companies

> or otherwise, which he is required to list, any share or portion of the capital or property of any company or corporation which is required to list or return its capital and property for taxation in this state' does not apply to shares of a foreign corporation, although the capital of the corporation is taxed in the state where located * * * * * ."

On page 159 we find the following language in the opinion of Mr. Justice Spear,

> "Every presumption is in favor of that construction of the law which gives effect to the requirement of the section of the constitution referred to and we are forced to the conclusion that the general assembly, in enacting this law, intended, so far as the complex nature of human business affairs should make it practicable, to include within the taxing provisions all property within the state * * * *. And further, that where an exception or exemption is claimed, the intention of the general assembly to except must be expressed in clear and unambiguous terms."

The court then quotes with approval the rule as follows:

> "The exemption must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported."

This rule is found in the following cases:

> Railway Co. vs. Supervisors, 93 U. S. 595
> Tucker vs. Ferguson, 22 Wall. 527.

Intent to confer immunity from taxation must be clear beyond a reasonable doubt, for, as in case of a claim of grant, nothing must be taken against the state by presumption or inference.

See Delaware Railroad Tax, 18 Wall. 206
Kirtland vs. Hotchkiss, 42 Conn. 426
Cincinnati College vs. State, 19 O. 110
Railroad vs. Dennis, 116 U. S. 665
Farrington vs. Tenn., 95 U. S. 679 (quoted supra)
Railroad vs. Guffey, 120 U. S. 569
Lima vs. Cem. Asso. 42 O. S. 128.

Again, we find in the opinion of Mr. Justice Spear on page 161 the following language:

> "The capital or property of the company may be largely real estate, while the shares are, in their nature, personalty. They can have no locality, and must, therefore, of necessity, follow the person of the owner, unless other provision is made by statute. The corporation is the legal owner of all property of the company, real and personal, and within the powers conferred upon it by its charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own."

And on page 162,

> "The shares of stock may be worth much more than the property of the corporation; that is, the franchise may be very valuable while the visible capital may be of but little value."

See Farrington vs. Tenn. Supra
People vs. Commrs. 4 Wall, 244
Bank vs. State, 9 Yerger, 490
Cook vs. Burlington, 59 Iowa, 251.

On page 163 Mr. Justice Spear refers to and quotes with approval the case of Bradley vs. Bauder, 36 O. S. 28, in which a part of the syllabus is as follows:

> "By the provisions of the act of May 11, 1878, an owner, residing in Ohio, of shares of stock in a foreign corporation, is required to list the same for taxation, notwithstanding the capital of the

corporation is taxed in the state where the corporation is located."

At the bottom of page 171 the court lays down the rule:

> "It is the unmistakable intention manifested in our tax legislation for the last twenty years—the central idea of our system of general ad valorem taxation—*to tax every person on what he is worth.*"
> (the italics are those of the court.)

The case of Hawley vs. Malden, 232 U. S. 1-12, is in support of the above enunciated doctrine. The very nature of a membership in a stock exchange exactly similar to the facts in this case was carefully considered by the Supreme Court of the United States in the case of Rogers vs. Hennepin County, quoted supra.

The duty was placed upon the general assembly of Ohio by Article 12, Section 2 of the constitution to pass laws taxing all property at its true value in money, with, of course, a few exceptions. Enactments of law are required to carry this into effect. In support of this see Bank vs. Hines, 3 O. S. 1, and Zanesville vs. Richards, 5 O. S. 589.

That the question as to whether or not laws taxing property of this character have been passed seems to us to be well settled in the case of Lee vs. Sturgis, Supra, and further enunciated in the case of Cincinnati vs. Connor, 55 O. S. 82 on page 91 of which we find the following language of the court:

> "The rule generally prevails that, independent of any legislative requirements on the subject, statutes imposing taxes and public burdens of that nature are to be strictly construed; and where there is ambiguity which raises a doubt as to the

> legislative intent, that doubt must be resolved in favor of the subject or citizen on whom the burden is sought to be imposed."

We find no authority which would justify an imputation to the legislature that there was no intention on its part to omit from taxation within this state of any property which it, the legislature, is required to tax under the terms of the Ohio constitution.

## CONCLUSION

It is therefore respectfully submitted that a seat on a stock exchange is personal property which may be taxed at the domicile of the owner thereof and that the taxation of such property at said place is not in contravention of the Constitution of the United States or the State of Ohio and that the judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

LOUIS H. CAPELLE,
Prosecuting Attorney

CHARLES S. BELL,
Ass't. Prosecuting Attorney.

# COURT OF APPEALS
## HAMILTON COUNTY, OHIO

No. 1313

*JOHN M. ANDERSON,*
*Plaintiff,*

*vs.*

*PETER W. DURR, as Auditor, et al,*
*Defendants.*

Murray Seasongood, Attorney for Plaintiff.

John V. Campbell, Prosecuting Attorney, and Walter M. Locke, Assistant Prosecuting Attorney.

## OPINION

Shohl, J.

This is an action in which plaintiff seeks to enjoin the auditor of Hamilton County from listing on the tax duplicate as taxable property plaintiff's membership in the New York Stock Exchange, and to restrain the treasurer from collecting taxes thereon.

The case was heard on appeal and there was a stipulation as to the facts in addition to the admissions in the pleadings.

The plaintiff is, and has been for a number of years, a member of the New York Stock Exchange, an unin-

corporated association of eleven hundred members. It owns the entire capital stock of The New York Stock Exchange Building Company, a corporation which holds title to real estate in New York City, and certain other stocks and securities. It furnishes exchange rooms and other facilities in New York City for the convenient transaction of brokerage business by members. The right conferred by the membership is to trade in accordance with the regulations which now authorize trading at the Exchange in New York City, and not elsewhere, in certain securities listed on said Exchange according to certain conditions, and at certain hours. Persons are admitted to membership only upon the vote of two-thirds of the fifteen members comprising the committee on admissions. They pay annual dues, and there is a life insurance feature for the benefit of their families. A transfer of membership may be made upon the submission of the names of the candidate to the committee on admissions and the approval of the transfer by two-thirds of the committee. There are no stock certificates but persons elected are notified by letter signed by the secretary. The Exchange has regular meetings at which officers and committees are elected, and they manage the business of the association. The plaintiff paid over $60,000.00 for his seat. It has a market value, and, subject to the acceptability of the transferee to the committee on admissions, is transferable by sale. The market value ranged from $60,000.00 or thereabouts in 1911 and low as $34,000.00 in 1914 to over $70,000.00 at the present time. Under the rules of the Exchange members charge their customers not less than one-

eighth of one per cent. as commission for purchases and sales of securities. When such purchaser is another member, however, he may purchase for a commission of one-fourth the regular amount, and in certain cases for one-fiftieth of one per cent. In the case of removal or suspension of a member, or at his death, his seat is sold and the net proceeds of such sale, after satisfying the claims of such creditors as are members, are paid over to the member or his personal representatives.

Plaintiff contends that the membership is a privilege incident to real estate in New York, that it is an incorporeal hereditament, and therefore not taxable in Ohio; second, that even if it is property in Ohio, it is not within the terms of the statute specifying the property which should be listed for taxation; and, third, that if the property were taxed in Ohio it would violate constitutional rights.

There is no question but what a seat on a stock exchange is property. It is conceded by counsel, and the authorities are clear.

Rogers v. Hennepin County 240 U. S. 184
Page v. Edmunds, 187 U. S. 596. (Philadelphia Stock Exchange)
Sparkhawk, v. Yerkes, 142 U. S. 1, (New York Stock Exchange)

Hyde v. Woods, 94 U. S. 523, (San Francisco Stock Exchange Board)
In re Currie 185 Fed. 731,
O'Dell v. Boyden, 150 Fed. 731,
Bank v. Abbott, 181 Mass. 531,
State v. McPhail, 124 Minn. 393,
Powell v. Waldron, 89 N. Y. 328,
Platt v. Jones, 96 N. Y. 24.

It is not taxed in New York under the general laws. People v. Feitner 167 N. Y. 1, though it is taxable under the New York inheritance tax law. Matter of Hellman 174 N. Y. 245.

In the Rogers case, 240 U. S. at page 189, the court cites with approval the language of the Minnesota case as follows:

> "A membership has a use and a buying and selling or market value. It is bought and sold * * * * There is a lien upon it for balances due members * * * * It passes by will or descent or by insolvency or bankruptcy * * * * It is true that there are certain restrictions in the ownership and use of a membership. These many increase or decrease its value, probably in the case of a board of trade membership greatly enhance it. They do not prevent its being property."

The exact nature of the property arising from membership in a stock exchange has not been conclusively adjudicated by the supreme court. In support of the argument that it constituted real estate in New York, reference was made by plaintiff to the case of Louisville Ferry Company v. Kentucky 188 U. S. 385, holding that the ferry franchise granted by the state of Indiana was an incorporeal hereditament, and therefore not taxable in Kentucky. On first impression there are points of similarity between a membership in a stock exchange and a ferry franchise. The rights to exercise the incidents of membership as to buying and selling stocks and securities are with respect to a specific piece of real estate in New York City, at least the present rules of the Stock Exchange so indicate. A careful analysis of the Louisville Ferry Company

case shows, however, that the decision rests primarily upon historical reasons. See pp. 394, 395. The references in Kent's Commentaries and Washburn on Real Property show this, and the court points out that a widow has been allowed dower in a ferry.

The law of incorporeal hereditaments is a relic of mediaeval law. Pollak and Maitland's History of English Law pp. 123-148 shows how the jurists of earlier days regarded certain rights with respect to land as "things." Tiffany on Real Property pp. 9-13 shows the modern law and summarizes as follows:

> "We find the only things of this nature recognized in this country are rights as to the use or profits of another's land, and franchises, or certain classes of franchises, and consequently these together with land and things annexed thereto corporal things real) are among the subjects of real property."

There is no authority and no justification for any extension of the law in respect to incorporeal hereditaments to adjudge a stock exchange membership to be realty. It does not descend to the heirs of the owner. The title to the land on which the business is done is held in fee simple in the realty corporation. The unclouded title could be conveyed away by it without the plaintiff's consent. It is urged that the ownership of all the stock in the realty company is a mere form, and that plaintiff's interest is substantially in real estate. This is no more true than a similar claim with respect to the right of a shareholder in any realty company. Such stock is personalty no matter what the corporation owns.

Morawetz on Corporations, section 225,
Hawley v. Malden, 232 U. S. 1, 12,
Lee vs. Sturges, 46 O. S. 153, 161.

The nature of a membership in an exchange was before the supreme court in the case of Rogers v. Hennepin County, 240 U. S. 184. The question involved there arose in connection with the taxability of a membership in the Chamber of Commerce of Minneapolis. The tax authorities were claiming that memberships were taxable in Minnesota. If such memberships consisted incorporeal hereditaments and were therefore realty, it would have been very simple for the supreme court to have said so and to have decided the case upon that ground. At page 191 the court uses the analogies of a credit in favor of a non-resident and of shares of stock. We do not regard the right as being in the nature of an incorporeal hereditament, but that does not dispose of the question. There is no doubt that a state law which attempts to tax personal property permanently situated in another state is void.

Southern Pacific Company v. Kentucky, 222 U. S. 63, 74,
Western Union Telegraph Company v. Kansas, 216, U. S. 1,
Metropolitan Life Insurance Company v. New Orleans, 205 U. S. 385,
Union Refrigerator Transit Company v. Kentucky, 199 U. S. 194,
Delaware etc. R. R. Co. v. Pennsylvania, 198 U. S. 341,
State Tax on Foreign-Held Bonds 15 Wallace 300.

Under the Rogers case, 240, U. S. 184, the membership could be taxed in New York. That does not neces-

sarily prevent it from being within the power of the state of Ohio to tax it.

Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54, 58,
Blackstone v. Miller, 188 U. S. 189, 204, 205.

In Hawley v. Malden, 232 U. S. 1, in distinguishing the Louisville Ferry Company case from the case of a share of stock, the supreme court says at page 12:

> "While the shareholder's rights are those of a member of a corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or choses in action. Morawetz on Corporations, section 225. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. Kirtland v. Hotchkiss, 100 U. S. 491; Bonaparte v. Tax Court, 104 U. S. 592; Covington v. First National Bank, 198 U. S. 100, 111, 112; Southern Pacific Company v. Kentucky, supra; Cooley on Taxation (3d ed.), 26."

The rights of a member of a stock exchange likewise entitle him to have the enterprise conducted in accordance with its regulations and purposes, and, are likewise in the nature of contract rights or choses in action. The right to go to the Exchange Building on Wall Street and there buy and sell is no doubt the most important incident of the membership, but the right to "split commissions" and the right of a member to procure the service of other brokers at a lower rate are also valuable rights. They follow him wherever he goes.

The relationship between the members is governed by the Constitution of the Exchange which every member is required to sign. By such signature he "pledges" himself to abide by the same and by all subsequent amendments thereto. The basis of his rights therefore is a contract, a chose in action.

The situs of an ordinary chose in action is well settled. It is regarded as property where the obligee is. In the case of State tax on Foreign-Held Bonds, 15 Wallace, 300, the court considers the suggestion that a debt is property where the debtor is. At page 320 the court says:

> "To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due."

The normal situs for purposes of taxation of choses in action is at the domicile of the owner.

Southern Pacific Co. v. Kentucky, 222 U. S. 63, 76,
Union Transit Co. v. Kentucky, 199 U. S. 194, 205,
Bonaparte v. Tax Court, 104 U. S. 592,
Kirtland v. Hitchkiss, 100 U. S. 491,
Cooley on Taxation, 89-93, 650, 651.

As this property is in the nature of a chose in action it is taxable at the domicile of the owner. It has been established that under certain exceptional conditions chooses in action may be given a situs for taxation elsewhere,

Hawley v. Malden, 232 U. S. 1, 12,
Liverpool etc. Insurance Co. v. Orleans Assessors, 221 U. S. 346,
Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395,
Blackstone v. Miller, 188 U. S. 189,
Kidd v. Alabama, 188 U. S. 730,
New Orleans v. Stempel, 175 U. S. 314,
State ex rel Goetzman v. Lord, 161 N. W. 516.

In the Hawley case the court states that the question does not arise there and need not be decided whether the provision by the state of incorporation fixing the situs of shares for the purpose of taxation there excluded the taxation of the shares by other states in which the owners resided. The case of Fidelity etc. Trust Company v. Louisville, 245 U. S. 54, probably ends the doubts on this point. But in the case at bar no such provision is involved. The normal situs for taxation at the domicile has therefore not been disturbed. It follows that the state of Ohio has the power to impose a tax upon plaintiff's membership in the New York Exchange.

Section 2 of Article 12 of the Ohio Constitution imposes upon the General Assembly the duty to pass laws taxing all property at its true value in money with certain exceptions. This requires the enactments of laws to carry it into effect.

Zanesville v. Richards, 5 O. S 589, 593,
Exchange Bank v. Hines, 3 O. S. 1.

Unless statutes were passed which did include the property in question it is not taxed.

Whitely v. Arbogast 6 N. P. N. S. 313;
9 C. C. N. S. 584, (Aff. 79 O. S. 429).

The question then is, have laws been passed taxing property of this character?

In the case of Gould v. Gould, 245 U. S. 151, the court states that in the interpretation of statutes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, nor to enlarge their provisions so as to embrace matters not specifically pointed out. In cases of doubt they are construed in favor of the citizens. The statutes there involved were passed pursuant to constitutional provisions that enabled the legislature to enact statutes. A special rule applies where the legislature is passing statutes which it is specifically required to enact. The purpose of the framers of the Ohio statutes must be interpreted in view of that constitutional duty.

In the case of Lee v. Sturges, 46 O. S. 153, 159, the court says:

> "It is clear that the purpose of section one is to tax all investments in stocks held within the state. This we are bound to assume, for every presumption is in favor of that construction of the law which gives effect to the requirement of the section of the constitution referred to, and we are forced to the conclusion that the general assembly, in enacting this law, intended, so far as the complex nature of human business affairs should make it practicable, to include within the taxing provisions all property within the state."

The precise distinction seems to have been in the contemplation of the court in the case of Cincinnati v. Connor, 55 O. S. 82, 91, wherein the court says:

> "The rule generally prevails that, **independent of any legislative requirements on the subject,** statutes imposing taxes and public burdens of that

> nature are to be strictly construed; and where there is ambiguity which raises a doubt as to the legislative intent, the doubt must be resolved in favor of the subject or citizen on whom the burden is sought to be imposed."

Section 5328 of the General Code provides:

> "All real and personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

We have already decided that a seat on the stock exchange constitutes personal property in this state. It is taxable, therefore, unless section 5328 is limited by section 5325. Section 5325 defines personal property, and being **in pari materia,** the two sections must be construed together. Cincinnati v. Connor, 55 O. S. 82, 89. If therefore "Personal property" as used in section 5328 includes only the enumerated items set forth in section 5325 it may be difficult to find it specified therein. A majority of the court are of the opinion that it might be included under the phrase "the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion or interest in such stocks, profits or means by whatsoever name designated." I cannot agree with them as to that.

The entire court is in agreement as to the following. Section 5325 provides "The term 'personal property'

as so used shall include" * * * * Then follows an enumeration of certain forms of property. This does not exclude the property in question. If the statute had been passed pursuant to constitutional provisions which merely authorized or empowered the levying of a tax we would be disposed to hold that other kinds of property were excluded by the rule of "expressio unius est exclusio alterius." However, the legislature was required to pass laws subjecting all real and personal property to taxation. The effect to be given to this is well stated by the supreme court of Minnesota. That state had a constitutional provision substantially like that of Ohio. In the case of State v. McPhail, 124 Minn. 398, in discussing whether a seat of the Duluth Board of Trade was taxed, the court says:

> "Section 797 names 11 specific classes of personal property, in no one of which are by name included Board of Trade memberships. So far as here material, its language is as follows: 'Personal Property' * * * * shall be construed to include:
>
> "1. All goods, chattels, moneys and effects." Then follows 10 other particular classes of property.
>
> Section 835 provides that the assessor shall fix the value of the items of personal property under 39 heads, the last of which is "The value of all other articles of personal property not included in the preceding items."
>
> We think it should not be held that section 797 was intended to describe all personal property that was subject to taxation. The language of the section does not compel such a conclusion. "Shall be construed to include" does not necessarily mean "shall only include." The section was not intended to be restrictive, but rather to help define what

was meant by "all personal property," as that term is used in section 794. The view is greatly strengthened by the unquestioned fact that it is the settled policy of the state as expressed in its Constitution, statutes and decisions, that all property within the state shall be taxed, unless exempt. Board of Co. Commrs. of Rice County v. Citizens National Bank of Fairbault, 23 Minn., 280, 286; State v. Jones, 24 Minn., 251; County of Olmsted v. Barber, 31 Minn., 256; 17 N. W. 473, 944; in Re Jefferson 35, Minn., 215, 219, 28 N. W. 256; State v. Stearns, 72 Minn., 200, 222, 75 N. W. 210. In the Rice County case, decided in 1877, in referring to section 1, c. 1, p. 1, Laws 1874, which provides that " all real property in this state, and all personal property of persons residing therein * * * * is subject to taxation" the court said: "The evident purpose of this section was to declare, in general terms, that all property, both real and personal, within the jurisdiction of the state, unless specifically exempted, should be subject to taxation." In State v. Jones, where it was decided that a certain debt was property and subject to taxation, Chief Justice Gilfillan said: "This debt was property, and it was the intention both of the Constitution and statute that all property, unless expressly exempted, should be taxed." At the time these and other decisions were rendered, there were in force statutory provisions similar to section 797, Laws 1874, p. 1, c. 1, sec. 3, provided that "personal property shall, for the purpose of taxation, be construed to include" certain described classes of property, and the same provision was contained in chapter 1, section 3, Laws 1878, in chapter 11, section 3, G. S. 1878, and in section 1510, G. S. 1894. In no case has it been considered that these provisions amounted to a declaration that no property was to be taxed that was not covered by the classes. It would have been a breach on the part of the legislature of a duty imposed by the Constitution to omit from taxation property that was not exempt, and we certainly should not find such a breach unless the statute is fairly open to no other construction."

Unless the statute is fairly open to no other construction we should not impute to the legislature an intention to omit from taxation property which the constitution requires it to tax.

The application for an injunction must be refused, and the petition will be dismissed.

Jones, P. J. and Hamilton J. concur.

February 3, 1919.

# Supreme Court of Ohio.

*JOHN M. ANDERSON,*

*Plaintiff in Error*

*vs.*

*PETER W. DURR, as Auditor, et al,*

*Defendants in Error*

## OPINION

By the Court: Is the membership in the New York Stock Exchange property? If so, is the situs of the property at the domicile of the owner? If these questions are answered in the affirmative, Do the statutes of Ohio provide for its taxation?

The record shows that the membership is a valuable right. The privileges of a member are not only valuable in their use, but the membership has a market value. Plaintiff paid more than $60,000 for his seat. The stock exchange owns the entire capital stock of the Exchange Building Company, which owns the real estate in which the business is conducted. Facilities are furnished for the conduct of brokerage business by members of the exchange. The right of a member is to trade at the exchange in New York, and not elsewhere, in securities listed on the exchange. Admissions to membership are made on the vote of the com-

mittee on admissions. Membership may be transferred on the approval by the transfer committee. On the death of a member his seat is sold and the net proceeds of the sale after payment of claims of members are paid to his estate.

When one has become a member of the New York Stock Exchange he has a contractual right to have the association conducted in accordance with its rules and regulations.

All of these things are essential incidents of property. The restrictions which the mutual agreements of the membership place upon the use and the ownership may possibly decrease its market value. On the other hand these very restrictions may increase its value. They do not affect its status as property any more than restrictions on the lots in a subdivision of real estate.

In ROGERS V. HENNEPIN COUNTY, 240 U. S. 184, it is held that memberships in exchanges, such as involved in this case, are property, notwithstanding restrictions upon their use, and nothing in the Federal Constitution prevents their being taxed; that whether such memberships are taxable under state statutes is a matter of local law; that the memberships are distinct from the assets of the corporation, and taxing members on their membership and the corporation on its assets does not amount to double taxation.

In the case we have here the membership is personal property, and the fact that the assets of the association consist in very large part of the capital stock of the realty corporation in New York City, and that the

privilege is to do business in the building there, does not give the membership the quality or character of real property.

The shares of stock in a realty company are personalty. The things that the company owns, whether real or personal, do not affect the character of the shares of stock in the company.

Where is the situs of the property or membership owned by the member?

It is well settled that a state has no power to tax personal property permanently situated in another state. SOUTHERN PACIFIC CO. v. KENTUCKY, 222 U. S. 63, 74.

As we have seen, the rights of a member are contractual. There are mutual covenants and agreements between the exchange and its members as well as the obligations assumed by the members toward each other. These contractual rights are enforceable, like other contract rights. They are choses in action.

A state has power to tax intangible property, choses in action, at the domicile of the owner, and such domicile is the situs of that class of personal property. 1 Cooley on Taxation (3 ed.) 89; SOUTHERN PACIFIC CO. v. KENTUCKY, supra, 63, 76. and UNION REFRIGERATOR TRANSIT CO. v. KENTUCKY, 199 U. S. 194.

In the recent case of FIDELITY & COLUMBIA TRUST CO. v. LOUISVILLE, 245 U. S. 54, it was held that liability to taxation in one state does not necessarily exclude liability in another.

Now, in this case the right secured to a member to go to the stock exchange in New York and t[illegible]re con-

duct his business in stocks in the manner prescribed is doubtless the most valuable right of membership. But as incident to his membership he is also granted the right to deal with and through other members on certain fixed percentages and methods of division of commissions. This right to secure the services of other members at a lower rate and to split the commissions is a very valuable right. By it the plaintiff in Cincinnati is enabled to properly hold himself out to the world as a member entitled to all the privileges and able to secure all the advantages of the New York Stock Exchange. All of which advantages are denied to nonmembers. He is thus enabled to conduct from and in his Cincinnati office a large business through other members in New York. All of which is regularly and properly done.

The situs of the valuable contractual property right of plaintiff is at the domicile of plaintiff in Cincinnati, and the State of Ohio has the right to tax it here.

In deciding that shares of stock constitute property, different from the capital or property of the company, Judge Spear, in LEE, TREAS. V. STURGES, 46 O. S. 153, says at page 161:

> "The capital or property of the company may be largely real estate, while the shares are, in their nature, personalty. **They can have no locality**, and must, therefore, of necessity, follow the person of the owner, unless other provision is made by statute. The corporation is the legal owner of all the property of the company, real and personal, and within the powers conferred upon it by its character, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. * * * The shares of stock may be

> worth much more than the property of the corporation; that is, the franchise may be very valuable while the visible capital may be of but little value."

The Constitution, Section 2, Article XII, enjoines the legislature to enact laws taxing by a uniform rule all property at its true value in money, with right to exempt certain property. It is well determined that this section is a limitation on the general power to tax conferred by the first section of Article II of the Constitution, and unless tax laws have been enacted which include the property here in question it is not taxed.

It is of course conceded that taxing statutes are to be construed strictly in favor of the citizen and against the taxing authority.

Section 5328, General Code, reads as follows:

> "All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title."

Section 5325, General Code, contains the following:

> "The term 'personal property' as so used includes first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of a parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stocks."

In LEE V. STURGES, supra, it is said at page 159:

> "For every presumption is in favor of that construction of the law which gives effect to the requirement of the section of the constitution referred to, and we are forced to the conclusion that the general assembly, in enacting this law, intended, so far as the complex nature of human business affairs should make it practicable, to include within the taxing provisions **all** property within the state, and not to exceed in its exemptions the limit prescribed, as to persons, of 'personal property not exceeding in value two hundred dollars for each individual.' And, further, that where an exception or exemption is claimed the intention of the general assembly to except must be expressed in clear and unambiguous terms. 'The exemption must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly to any other construction that the proposition can be supported."

RAILWAY CO. V. SUPERVISORS, 93 U. S. 595; TUCKER V. FERGUSON, 22 Wall. 527. Intent to confer immunity from taxation must be clear beyond a reasonable doubt, for, as in case of a claim of grant nothing can be taken against the state by presumption or inference."

The provisions of Section 5328, General Code, are comprehensive and provide for the taxation of all real or personal property, and that includes the property here in question.

Section 5325, General Code, does not exclude any property or thing from the term personal property, but out of abundant caution provides that the term shall

include the things named. It cannot be construed as if it read the term shall **only include.**

As pointed out in OHIO ELECTRIC RY. CO. V. VILLAGE OF OTTAWA, 85 O. S. 229, 236, the maxim expressio unius exclusio alterius is to be applied only as an aid to discover intention, and not to defeat clear intention.

In view of the plain provision of the constitution enjoining the taxation of all property real and personal, and of the equally plain provision of Section 5328, General Code, passed in obedience to that constitutional injunction, there can be no doubt that when it is once determined that the membership in question is personal property, and that its situs is the domicile of the plaintiff in Hamilton County, it is taxable there.

Judgment affirmed.

Jones, Matthias, Johnson, Wanamaker and Robinson, JJ. concur. Donahue, J. not participating.

No. 27

OCTOBER TERM 1921

# Supreme Court of the United States

---

JOHN M. ANDERSON,
*Plaintiff in Error,*

vs.

PETER W. DURR, as former Auditor, et al.,
*Defendants in Error...*

---

## Reply Brief for Plaintiff in Error

---

MURRAY SEASONGOOD,
*Counsel for Petitioner and Plaintiff in Error.*

No. 27

OCTOBER TERM 1921

# Supreme Court of the United States

---

JOHN M. ANDERSON,
*Plaintiff in Error,*

vs.

PETER W. DURR, as former Auditor, et al.,
*Defendants in Error.*

---

## Reply Brief for Plaintiff

---

The brief of defendants in error does not disprove that the membership involved, is a right or privilege belonging or appertaining to a building (Sec. 5322). The brief does not seek to disprove our contention, that there is no Ohio Statute in which it is "otherwise specified" this right and privilege belonging or appertaining to real estate, shall be included in the term "real property" for purposes of taxation. The brief totally ignores Section 5322, as did the opinion of the Ohio Supreme Court, although the attention of that Court is shown by the Record to have been directed to Section 5322, by the motion for an order directing the Court of Appeals to certify its record (R. 62), and again, in the application for rehearing (R. 66).

The opinion of the Court of Appeals of Ohio, quoted in the brief of defendants in error, goes on a totally fallacious view. That Court, unable to find any specific reference to property such as is involved here, in the taxing statutes, thought itself bound to tax this property under Article XII, Section 2, of the Ohio Constitution. (Br. def. in error, p. 27.) As the Supreme Court of Ohio pointed out, however, in its opinion, Article XII, Section 2, is a limitation on the taxing power. The Supreme Court also corrected the erroneous view of the Court of Appeals, namely, that the rule of interpretation of taxing statutes is different than in other states. (Br. def. in error, p. 28.) The Supreme Court repeated the pronouncement, often made by it, taxing statutes are to be strictly construed in favor of the subject, but having repeated the rule established by its decisions, the Court deviated therefrom without assigning any reason therefor, except that exemptions from taxation are to be clearly made out. We are not concerned here with an attempted exemption from taxation. We maintained, this property was not covered by the Ohio taxing statutes. Of course, it is only property covered by the statutes which can be claimed to be exempted by other statutes. We have nothing to do with exemption here.

The brief is also silent, as is the Ohio Supreme Court opinion, R. 77-8; application for rehearing, R. 65 bot.), on the practical construction of the taxing statutes in Ohio, exempting such memberships from taxation for a generation, by those having tax collection in charge and by the Supreme Court of Ohio, interpreting the very Section 5328 (formerly R. S. Sec. 2731), in a manner which would not include this membership (*Chisholm* v. *Shields*, 67 O. S. 374 [1902]), long before plaintiff acquired his membership.

Neither brief nor opinion refers to the admission of the counsel for the taxing authorities in the trial court (R. 10), based, in part, on *Chisholm* v. *Shields, supra,* that the membership could not be taxed under the Ohio laws.

Even aside from the rule of *Gelpcke* v. *Dubuque*, 1 Wall. 175, the decision of the Ohio Supreme Court can not prevent this Court from determining what is the essential nature of such a membership.

As shown in our original brief, the closest analogy to such a membership is a private right of way in gross (B., p. 7). Although ways are classified by Blackstone as incorporeal hereditaments, a private way dies with the grantee and if in gross is personal and can not be assigned.

In the civil law (Holmes Common Law, p. 389) there were many servitudes attaching to or inhering in buildings. Yet servitudes were classified as incorporeal (Moyle's Translation of Institutes of Justinian, 4 Ed., p. 46, Book II, Title 3, Sec. 1).

Likewise, in the civil law, usufruct (Id. Title IV, p. 47) was an incorporeal right to use or take the fruits of property not one's own without impairing the substance of that property.

The manner of descent, any more than the manner of conveyance does not determine the essential nature of the thing. For instance, in the civil law, personalty and realty both belong to the heir (Howe's Studies in Civil Law, p. 166). In addition to examples mentioned in our first brief, of rights incident to real estate, not frequently thought of as such, may be mentioned rent, which, in early law, was regarded as a real right of which a disseisen was possible and for which a possessory action could be brought (Holmes Common Law, p. 389)

and the right to services (Id. 388, 392); in an article in 7 Virginia Law Reporter, p. 325, Mr. Sims, the author, mentions many rights relative to real property, which have always remained unclassified and which do not admit of classification.

As an additional example of the somewhat arbitrary classification of property as real or personal, depending on ancient customs and circumstances apart from the essential nature of the property itself, attention is called to *Yearworth* v. *Pierce*, Alleyn's Reports, p. 31 (1678), where it was shown, dung in a heap was regarded as a chattel going to the executor, but scattered upon the ground, it was parcel of the freehold.

There is, then, no legal impropriety and there is sound legal reason, in regarding the right to do business on a particular piece of real estate as a right inhering or attached to real estate, for purposes of taxation.

Even if it be assumed, however, this membership is personal property of an intangible character, it is different from any other kind of intangible property which has been taxed by permission of decisions of this Court at the domicile of the owner, through application of the familiar maxim. Intangible property related to real property has been exempted by the decisions of this Court (*Louisville & Jeffersonville Ferry Case*). The permanent situs of the property here involved is in New York, and, therefore, the particular classification of this property as real or personal, tangible or intangible, has no important bearing on its taxability.

As said by this court in *Shaffer* v. *Carter*, 252 U. S. 37, 55:

> " * * * where the question is whether a state taxing law contravenes rights secured by that instru-

> ment," (the Constitution) "the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed."

In *Maguire* v. *Trefry*, 253 U. S. 12, 16, this Court, referring to the maxim "*mobilia sequuntur personam,*" as the general rule, justifying, "except under exceptional circumstances," taxes on intangible personal property at the domicile of the owner, added:

> "We have pointed out in other decisions that the principle of that maxim is not of universal application and may yield to the exigencies of particular situations."

One of these decisions is *Bristol* v. *Washington County*, 177 U. S. 133, 141, where the Court said:

> "The fiction is not of universal application and yields to actual situs when justice requires it should."

In *Smith* v. *Union Bank of Georgetown*, 5 Peters, 518, 523, the Court said:

> "That personal property has no situs, seems rather a metaphysical position than a practical and legal truth * * * the common law has given it a situs, by reference to any circumstances which mark it locally with discrimination and precision."

Examples mentioned (p. 522 bot.-3), in early law, were bond debts, which were regarded as assets for administration, where the bond or specialty was at the time of death of the owner, not where he dwelt or died; also judgments, which were given locality by the situs of the court where entered.

In *Rogers v. Hennepin County*, 240 U. S. 184, the situs for taxation of a somewhat similar membership was fixed, by the decision of this Court, at the place where the exchange is located. It is interesting to note the non-resident member there contended, the right to "split commissions" fixed the situs of the membership of one who did not operate upon the exchange personally except at rare intervals (p. 186), at the domicile of the owner and not where the exchange was located. This Court did not, contrary to the later view of the Ohio Supreme Court (R. 78), regard that privilege, any more than the privilege of going on the exchange in person, as establishing a situs at the domicile of the owner. On the contrary, this Court said, having mentioned the right to "split commissions," that memberships in an exchange represent rights and privileges to be exercised at the exchange where located and a proper situs for taxation is, therefore, at the place where the exchange is located.

As plaintiff's membership has a permanent situs in New York, the taxing power of Ohio may not reach it.

Respectfully submitted,

MURRAY SEASONGOOD,
*Counsel for Petitioner and Plaintiff in Error.*

# CITIZENS NATIONAL BANK OF CINCINNATI, ADMINISTRATOR OF ANDERSON, *v.* DURR, AS FORMER AUDITOR, ET AL.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 27. Argued October 7, 1921.—Decided November 7, 1921.

1. Where objection to a tax imposed under general state statutes was limited to a claim of constitutional immunity for the particular subject taxed, without drawing in question the validity of the statutes as construed or of the authority exercised under the State in imposing the tax, a judgment sustaining the tax is reviewable by certiorari but not by writ of error, under Jud. Code, § 237, as amended. P. 106.
2. A constitutional ground advanced for the first time in a petition for rehearing, presented to a state Supreme Court and denied without reasons given, comes too late to raise a question for review by this court. P. 106.
3. A membership in the New York Stock Exchange, although partaking of the nature of a personal privilege and assignable only with qualifications, is a valuable property right subject to property taxation. P. 108.
4. Whether such a membership, when held by a resident of Ohio, is subjected to taxation by the Ohio taxing laws, is a question of state law determinable by the Supreme Court of that State. P. 108.

5. Since a membership carries peculiar and valuable privileges, not confined to the real estate of the Exchange in New York, which enable a nonresident member to conduct a lucrative business in the State of his residence through other members in New York, his membership is taxable as intangible personal property at his domicile. P. 108. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385, distinguished.

6. Taxation by two States upon identical or closely related property interests falling within the jurisdiction of both is not forbidden by the Fourteenth Amendment. P. 109.

7. A discrimination, in imposing a tax in Ohio on a membership in the New York Stock Exchange while exempting memberships in a local stock exchange, which may have been due to mere accident or negligence of subordinate officials, or have been based upon some fair reason, the presumption of which was not rebutted, *held* not to render the tax invalid under the Equal Protection Clause. P. 109.

8. The fact that non-resident members of the New York Stock Exchange may deal in its securities through other members for less commissions than are charged non-members, affords a reasonable ground for taxing the privilege in the one case and not in the other. P. 110.

9. A tax on a membership in the New York Stock Exchange employed by an Ohio broker in executing orders for his Ohio clients through the exchange in New York, *held* not an unconstitutional burden on interstate commerce. P. 110.

100 Oh. St. 251, affirmed.

REVIEW of a judgment of the Supreme Court of Ohio sustaining a tax in a suit brought by Anderson to enjoin its enforcement.

*Mr. Murray Seasongood* for plaintiff in error and petitioner.

A voluntary association like this has no technical name or place in the law. Each member does his own business and is not interested in the business done by any other member. The Exchange, as such, does no business; there are no profits or losses to be divided. Although the Exchange owns property, the ownership is a mere incident

and not the main object of the association. The member has no severable property interest in it, nor a right to any proportionate part on withdrawing. Substantially, the whole property of the association is the Exchange real estate, consisting of its land and the building in New York City. The title to this land and building is in a New York corporation, of which the entire capital stock is beneficially owned by the Exchange. This method of holding the real estate is adopted in order to avoid difficulty of conveying the land.

A seat or membership is a species of incorporeal property, a personal, individual right to exercise a certain calling in a certain place, but without the attributes of descendibility or assignability characteristic of other species of property. It cannot be attached or seized on execution, being, in substance, a mere license to buy and sell.

A privilege inseparably connected with real estate should be regarded, in taxation statutes, as in the nature of real estate. § 5322, Ohio Code.

The membership is exactly analogous to the ferry franchise considered in *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385. See *Currier* v. *Studley*, 159 Mass. 17, 24.

Whether a personal right to go on certain real estate at certain hours only and transact there, either in person or by others having the same right, business in a limited class of securities, subject to rules prescribed by the governing body of the owners of the real estate, is technically an easement, a franchise, a private right of way or way in gross, the substantial rights, by whatever name called, are inseparably connected with real estate, just as much as was the ferry right in the *Jeffersonville Ferry Case*. Crops growing in the ground are personal property and leases for years are things personal or chattels real, yet they certainly relate to real estate. So of an estate *pur autre vie*.

Fixtures, title deeds, family portraits, money, slaves and other heirlooms are personal property, but were treated sometimes as realty. 2 Bouvier, 14th ed., 414. The method of conveyance does not determine the essence of the thing. Immovables and movables were the divisions in the civil law of what we call real and personal property. *Ibid.*

*Rogers* v. *Hennepin County*, 240 U. S. 184, and *Goetzman* v. *Minnesota Tax Commission*, 136 Minn. 260, are conclusive that what gives a membership value is the right, exercisable where the Exchange is located and that that, therefore, fixes the situs for taxation. See *Thompson* v. *Adams*, 93 Pa. St. 55; *Pancoast* v. *Gowen*, 93 Pa. St. 66; *Page* v. *Edmunds*, 187 U. S. 596; *Barclay* v. *Smith*, 107 Ill. 349; *Lowenberg* v. *Greenebaum*, 99 Cal. 162; *London & Canada Loan, etc.* v. *Morphy*, 10 Ont. Rep. 86; *Ketcham* v. *Provost*, 141 N. Y. S. 437; *Weston* v. *Ives*, 97 N. Y. 222; *Lemmon* v. *Feitner*, 167 N. Y. 1; *Baltimore* v. *Johnson*, 96 Md. 767; *San Francisco* v. *Anderson*, 103 Cal. 69; *Caldicott* v. *Griffiths*, 8 Exch. 898; *Belton* v. *Hatch*, 109 N. Y. 593; *White* v. *Brownell*, 4 Abb. Pr., N. S., 162; s. c. 3 Abb. Pr., N. S., 324; *In re Hurlbutt Hatch & Co.*, 135 Fed. 504; *In re Stringer*, 253 Fed. 352.

These cases recognize that a membership in the Exchange is unquestionably property, but they also recognize that it is unique and cannot be realized on in the way that ordinary real or personal property is subjected to seizure,—all rights must be worked out through the New York Stock Exchange and subject to its constitution and conditions. These cases all tend to show that the situs of the property is where the Exchange is located and not elsewhere. Cf. *Standard Gas Power Co. of Georgia* v. *Standard Gas Power Co. of Delaware*, 224 Fed. 990; *Murphy* v. *Ford Motor Co.*, 241 Fed. 134.

While this privilege is not granted by the State of New York, as is the franchise of a New York corporation, the

right conferred by the Committee on Admissions is to do business in New York, just as much as if the right had been conferred by the State of New York. It is immaterial whether the member does this business in person, or through others on a basis more favorable than such others would do the business for non-members. The business, in either case, is transacted on the floor of the Exchange in New York City. If no business is done, no income is earned. Nor has plaintiff in error any muniment of title in Ohio, or elsewhere.

In the case of stocks, the owner has power at his domicile to effect a sale or pledge, to will them specifically, to receive, at his domicile, earnings of the corporation, and he has a proportionate share of the corporate assets. He has a stock certificate, which is a negotiable document of title, personal property, in many States, subject to seizure by execution.

In the case of bonds, the owner has a right to a definite income, at his domicile, without the necessity of effort on his part to produce such income. Even if the bond is not kept in the State of his domicile, it is readily removable thereto, at any time; whereupon a complete enjoyment of it there will be in the owner. In the case of money or bank accounts, the same is true. The owner is in complete control and can transfer the account from one State to another by signing his name to a check.

But, in the case at bar, plaintiff, to acquire his membership, paid $60,000 in 1911. As there are 1,100 members and less than $6,000,000 of assets, it is obvious the plaintiff did not pay $60,000 to get an interest in these assets, since his proportionate share would be less than $5,500 and since the Exchange has not made and does not make any distribution of assets to members.

It is contended by us that a privilege inseparably connected with real property is in the nature of real property for taxation purposes. If this membership is to be classed

as intangible personal property, it is not such as may be taxed at the State of domicile, as other intangible property may be, because this intangible right has a permanent situs in New York. *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325.

The plaintiff is taxed because of a mere incident, on the whole value of his membership, the substantial value of which, as the court concedes, is doing business in another State, which may not be taxed. This is a mere "quibble" (*Selliger* v. *Kentucky*, 213 U. S. 200, 206), analogous to taxing a corporation doing both intrastate and interstate business on its intrastate business, so that taxation of the interstate business done will also be included. The decisions of this court have forbidden that. *International Paper Co.* v. *Massachusetts*, 246 U. S. 135; *Delaware, Lackawanna & Western R. R. Co.* v. *Pennsylvania*, 198 U. S. 341.

The court below was in error in assuming that the "incident" of division of commissions is business done in Ohio. A member in Ohio divides the fixed commission earned for transacting business in New York with the member in New York transacting the business. A non-member in Ohio may not divide the commission earned by his correspondent in transacting the business, but he can have the business transacted, nevertheless, and earn a commission. In neither case does the Ohio broker execute transactions in Ohio. That is impossible. Both send on orders, to be executed by a member of the Exchange in New York. The orders cannot be executed except on the floor of the Exchange.

An Ohio citizen may own real estate in New York and enjoy increased credit from general knowledge of his ownership of it. He may derive rents in Ohio from such real estate, but, if such rents were taxable, surely that would not permit taxation by Ohio of the real estate. Whatever fraction of commission the member earns from orders

forwarded to New York is taxed as money or credits in Ohio. The fact that he earns such fractions does not justify taxing his membership in the New York Exchange, any more than it would justify taxing real estate he might own in New York or justify taxing a non-member broker on the membership in the New York Exchange of the broker who executes his orders.

Plaintiff, subjected to unreasonable, discriminatory and multiple taxation, is deprived of the equal protection of the laws.

The tax sought to be levied is a direct burden on interstate commerce. Plaintiff transacted no business in Ohio by virtue of his membership in the Exchange. Securities listed on that Exchange must be bought and sold there and not elsewhere, under penalty of expulsion for non-compliance with the rule requiring this. The Ohio tax is said to be a property tax. Applied, however, to the privilege here in question, it is a tax levied on the privilege, and the privilege, if any business is done in Ohio, is to do only interstate commerce. *Union Tank Line Co.* v. *Wright*, 249 U. S. 275.

The decision of the court below denied plaintiff due process of law and the equal protection of the laws. It amounted to so gross a mistake as not to be possible, if well recognized rules of decision and precedents had been followed. *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, 30. Again, the settled course of construction of the Ohio taxing statutes had become a rule of property conferring, for the years preceding, immunity from taxation on this privilege, within the spirit of *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Louisiana* v. *Pilsbury*, 105 U. S. 278; *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544; *Milwaukee Electric Ry. Co.* v. *Milwaukee*, 252 U. S. 100; *Chisholm* v. *Shields*, 67 Oh. St. 374.

*Mr. Charles S. Bell*, with whom *Mr. Louis H. Capelle* was on the brief, for defendants in error and respondents.

MR. JUSTICE PITNEY delivered the opinion of the court.

A suit for injunction brought in a state court by Anderson against Durr, then Auditor, and Cooper, then Treasurer, of Hamilton County, Ohio, raised the question whether a certain property tax imposed under authority of the State of Ohio upon plaintiff, a resident of that State, by reason of his owning a membership—figuratively termed a "seat"—in the New York Stock Exchange, infringed his rights under the commerce clause of the Constitution of the United States or the "due process of law" or "equal protection" provisions of the Fourteenth Amendment. His assault upon the tax was sustained by the court of first instance (20 Ohio N. P., N. S., 538), but overruled by the Court of Appeals (29 O. C. A. 465), and finally by the Supreme Court of the State (100 Ohio St. 251). Until the decision of the latter court the federal right had been asserted merely as a claim of immunity from the tax under the constitutional provisions referred to, without drawing in question the validity of any statute of, or authority exercised under the State on the ground of their being repugnant to those provisions. After the final decision, in an application to the Supreme Court for a rehearing, plaintiff for the first time asserted that the decision, if adhered to, rendered the Ohio taxation statutes invalid because of such repugnance. This application was denied without reasons given, and hence must be regarded as having come too late to raise any question for review by this court. *Loeber* v. *Schroeder*, 149 U. S. 580, 585; *Fullerton* v. *Texas*, 196 U. S. 192, 193; *Corkran Oil Co.* v. *Arnaudet*, 199 U. S. 182, 193. Therefore a writ of error, allowed by the chief justice of the Supreme Court, must be dismissed because not the proper mode of review under § 237 Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726. But an application for the allowance of a writ of certiorari, made to this court under

the same section, consideration of which was postponed until the hearing on the writ of error, will be granted, and the case determined thereunder.

The essential facts are as follows: Plaintiff holds a membership or seat in the New York Stock Exchange for which he paid $60,000, and which carries valuable privileges and has a market value for the purposes of sale. The Exchange is not a corporation or stock company, but a voluntary association consisting of 1100 members, governed by its own constitution, by-laws and rules, and holding the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands, situated in the City of New York and having a value in excess of $5,000,000. A member has the privilege of transacting a brokerage business in securities listed upon the Exchange, but may personally buy or sell only in the Exchange building. Membership is evidenced merely by a letter from the secretary of the Exchange notifying the recipient that he has been elected to membership. Admissions to membership are made on the vote of the Committee on Admissions. Membership may be transferred only upon approval of the transfer by the committee, and the proceeds are applied first to pay charges and claims against the retiring member arising under the rules of the Exchange, any surplus being paid to him. On the death of a member, his membership is subject to be disposed of by the committee; but his widow and descendants are entitled to certain payments out of a fund known as the "Gratuity Fund." In the business of brokers in stocks and bonds a differentiation is made between members of the Exchange and non-members, in that business is transacted by members on account of other members at a commission materially less than that charged to non-members. A firm having as a general partner a member of the Exchange is entitled to

have its business transacted at the rates prescribed for members.

That a membership held by a resident of the State of Ohio in the Exchange is a valuable property right, intangible in its nature but of so substantial a character as to be a proper subject of property taxation, is too plain for discussion. That such a membership, although partaking of the nature of a personal privilege and assignable only with qualifications, is property within the meaning of the bankrupt laws, has repeatedly been held by this court. *Hyde* v. *Woods*, 94 U. S. 523, 524–525; *Sparhawk* v. *Yerkes*, 142 U. S. 1, 12; *Page* v. *Edmunds*, 187 U. S. 596, 601. Whether it is subjected to taxation by the taxing laws of Ohio, is a question of state law, answered in the affirmative by the court of last resort of that State, by whose decision upon this point we are controlled. *Clement National Bank* v. *Vermont*, 231 U. S. 120, 134.

The chief contention here is based upon the due process of law provision of the Fourteenth Amendment: it being insisted that the privilege of membership in the Exchange is so inseparably connected with specific real estate in New York that its taxable situs must be regarded as not within the jurisdiction of the State of Ohio. *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385, is cited. It is very clear, however, as the Supreme Court held, that the valuable privilege of such membership is not confined to the real estate of the Stock Exchange; that a member has a contractual right to have the association conducted in accordance with its rules and regulations, and, incidentally, has the right to deal through other members on certain fixed percentages and methods of division of commissions; that this right to secure the services of other members and to "split commissions" is a valuable right by which plaintiff in Cincinnati may properly hold himself out as a member entitled to the privileges of the Exchange, denied to non-members; and

that thus he is enabled to conduct from and in his Cincinnati office a lucrative business through other members in New York. The court held, and was warranted in holding, that the membership is personal property, and being without fixed situs has a taxable situs at the domicile of the owner. *Mobilia sequuntur personam.* See *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 205. The asserted analogy to *Louisville & Jeffersonville Ferry Co.* v. *Kentucky, supra*, cannot be accepted. That decision related to a public franchise arising out of legislative grant, held to be an incorporeal hereditament in the nature of real property and to have no taxable situs outside the granting State. It did not involve the taxation of intangible personal property. See *Hawley* v. *Malden*, 232 U. S. 1, 11; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325, 328.

Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that State to tax them even as against a resident of Ohio. (See *Rogers* v. *Hennepin County*, 240 U. S. 184, 191.) Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment (*St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 367-368); much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden. *Kidd* v. *Alabama*, 188 U. S. 730, 732; *Hawley* v. *Malden*, 232 U. S. 1, 13; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54, 58.

That plaintiff is denied the equal protection of the laws, within the meaning of the Fourteenth Amendment, cannot be successfully maintained upon the record before us. The argument is that other brokers in the same city are not taxed upon the value of their memberships in the local stock exchange, nor upon the privilege of doing business in New York Stock Exchange securities. As to the

local exchange memberships, it may be that the failure to tax them is but accidental or due to some negligence of subordinate officers, and is not properly to be regarded as the act of the State. If it be state action, there is a presumption that some fair reason exists to support the exemption, not applicable to a membership in the New York Exchange, and plaintiff has shown nothing to overcome the presumption. As to the privilege referred to, it already has been shown that the rights incident to plaintiff's property interest give him pecuniary advantages over others in the same business. Manifestly this furnishes a reasonable ground for taxing him upon the property right, although others enjoying lesser privileges because of not having it may remain untaxed.

The contention that the tax constitutes a direct burden upon interstate commerce is groundless. Ordinary property taxation imposed upon property employed in interstate commerce does not amount to an unconstitutional burden upon the commerce itself. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 23; *Cleveland, &c. Ry. Co.* v. *Backus*, 154 U. S. 439, 445; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 700.

*Writ of error dismissed.*
*Writ of certiorari granted.*
*Judgment affirmed.*

MR. JUSTICE HOLMES.

The question whether a seat in the New York Stock Exchange is taxable in Ohio consistently with the principles established by this Court seems to me more difficult than it does to my brethren. All rights are intangible personal relations between the subject and the object of them created by law. But it is established that it is not enough that the subject, the owner of the right, is within the power of the taxing State. He cannot be taxed for land situated elsewhere, and the same is true of personal

property permanently out of the jurisdiction. It does not matter, I take it, whether the interest is legal or equitable, or what the machinery by which it is reached, but the question is whether the object of the right is so local in its foundation and prime meaning that it should stand like an interest in land. If left to myself I should have thought that the foundation and substance of the plaintiff's right was the right of himself and his associates personally to enter the New York Stock Exchange building and to do business there. I should have thought that all the rest was incidental to that and that that on its face was localized in New York. If so, it does not matter whether it is real or personal property or that it adds to the owner's credit and facilities in Ohio. The same would be true of a great estate in New York land.

As my brothers VAN DEVANTER and MCREYNOLDS share the same doubts it has seemed to us proper that they should be expressed.